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In The

Supreme Court of the United States

ALEXANDER, KATHERINE, WILLIAM, and JAMES BERGMAN, by and through their parents and next friend, BRAD and LIBBY BERGMAN, et al.,

Petitioners,

v.

STATE OF KANSAS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Kansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Does a State violate Equal Protection when it purposefully disadvantages school children by unevenly restricting funds available for public education and then prohibiting under funded school districts from funding the difference out of local funds?

2. Does a State violate the First and Fourteenth Amendments when it purposefully but unevenly restricts State funds available for public education and then prohibits the under funded school districts from funding the difference out of local funds by imposing a mandatory cap on spending on public education?

3. Did the Kansas Supreme Court violate the Fourteenth Amendment's Due Process Guarantee when it refused to permit non-party parents and school children to intervene in an action in which the Court indefinitely suspended their right to use local funds to improve their public education without giving them notice or an opportunity to be heard?

4. Did the Kansas Supreme Court violate the 14th Amendment's Due Process Guarantee when it ignored common law limitations on its remedial discretion and arbitrarily ordered the legislature to indefinitely suspend petitioners' liberty and property interests until the legislature funded an undefined level of public education for all other children?

II. PARTIES TO THE PROCEEDING

Petitioners are parents and school children attending the Shawnee Mission Unified School District No. 512 or the Blue Valley Unified School District No. 229: Alexander, Katherine, William, James, Brad, and Libby Bergman, Patrick, Doug, Bob, and Debbie Dellinger, Madison, Breanna, and Carol Rowe, Connor, Cameron, and Ann Carollo, Sydney, Wyatt, and Kim Edmisten, Sarah, Nathan, and Dan Goldman, Abigail, Parker, and Bonnie Heying, Connor, Kylie, Courtney, and Tracy Rellihan, Ben and Mary McBride, Graham and Noah Eidemiller, Janice Langholz, Peter, Robby, Joseph, and Judy Moriarty, A.J., Will, Maureen and Trish Orth, Joe, Sydney, and Mary Bahr, Maxwell, Emma, and Christine Braasch, Chase and Susan Schaible Ainsworth, William, Harrison, and Brian Short, Helen, Anna, and Mary Petrow, Johnnie, Danielle, Alexandria, and Julie Norton, Morris, Charles, Ronald, and Barbara Bronstein, Lauren, Erik, Janis, and Christian Hansen, Ryan, Michael, Daniel, Greg, and Laurie Widrig, Lucy, Mary, and Dan Bush, Jonathon, Jefferson, Caroline, Brad, and Rebecca Adams, Andrew, Alexandra, Katie, Steve, and Lori Dykeman, Taylor, Zachary, Donna, and Jim Wilson, Jason, Michael, Michelle, and James Hoffman, Kristin, Eric, Mary, and Dave Larson, Grace, John, and Aymi Foley, Max, Reilly, Brad, and Michelle Agadoni, John Tyler, Megan, Caroline, Susan, and Mark Koenig, Addison, Jillian, and Michelle Schlatter, Hannah, Max, Janice, and Jeff Pinson, Emma, Cameron, David, and Susan Keefer, John, Paige, Kathryn, and Jim Dussold, Brenan Patrick, Conner James, Dillon Thomas, Linda, and Timothy Cavanaugh, Tyler, Andre, Ahmet, and Lori Kodanaz, Justin, Alexandra, Reid, Rhonda, and Patrick

PARTIES TO THE PROCEEDING – Continued

Johnston, Mark, John, Steven, Jennifer, Steve, and Jody Bolton, Blake, Erin, Benjamin, Phil, and Mary Hylton, Bradley, Leslie, Doug, and Shea Dixon, Spencer, Kendra, Betsy, and Tommy Avenia, Trent, Gardner, and Sheryl Wright, Morgan, Elizabeth, Lynne, and Gerald Matile, Marissa, Hayley, Stacey, and Howard Wizig, John, Joseph, William, and Anne Blessing.

Respondents are the Attorney General of the State of Kansas, the Kansas State Board of Education, and various state officials charged with enforcement of the challenged Kansas school finance statutes: Connie Morris, Janet Waugh, Sue Gamble, John W. Bacon, Bill Wagnon, Kathy Martin (substituted party), Ken Willard, Carol Rupe, Iris Van Meter, Steve E. Abrams, Bob L. Corkins (substituted party), the Salina Unified School District No. 305, the Dodge City Unified School District No. 443, and parents and school children attending those two school districts in Kansas: Ryan Montoy, Lajuan and Mytesha Robinson, Sierra and Seth Gwin, Rene Bess, Keely Boyce, Cruz Cedillo, Lynette Do, Christopher and Monique Harding, Joseph Hawkinson, Jennie Nguyen, Sandy, Nicole, and Bruce Thu Pham, Andrea Bethke, Damian and Dylan Arredondo, Eduardo Dominguez, Chris Freeman, Monica Garcia, William Zachary Harrison, Robert Hindman, Alex Jake, Yadira Moreno, Manuel Solorzano, Benjamin Vicente, Brittany Ash-Clark, Jin Jeon, Jacob Stack, Bronson Waite, Jacob Lemaster, Nicholas Woodfield Brooke, Blaine Smith, Jerry Dix, Tanner Robidou, Justin Hostetter.

III. CORPORATE DISCLOSURE STATEMENT

None of the Petitioners are a corporation that has issued shares to the public, nor are any a parent corporation, a subsidiary or affiliate of corporations that have done so.

IV. TABLE OF CONTENTS

		Page
I.	Questions Presented	i
II.	Parties to the Proceeding	ii
III.	Corporate Disclosure Statement	iv
IV.	Table of Contents	v
V.	Table of Authorities	vii
VI.	Opinions and Orders Below	1
VII.	Jurisdiction	1
VIII.	Constitutional and Statutory Provisions	1
IX.	Statement of the Case	2
X.	Reasons For Granting the Writ	13
	A. This case raises important issues of national significance by seeking to test the constitutionality of a state's efforts to create equality in its public school system by depriving some children, who the state perceives, wrongly, as privileged or advantaged, of equal protection and fundamental liberties guaranteed to them under the Constitution	13
	B. This case involves an important question of federal law that has not been, but should be, decided by this Court with respect to the constitutional limits on a state court's adjudication of the constitutionality of a state's school finance scheme under that state's constitution because, if left undisturbed, the Kansas Supreme Court's decisions disrupt the balance of power within our federalist system and interfere with the constitution's preservation of individual liberties	19
XI.	Conclusion	23

V. TABLE OF AUTHORITIES

Page

CASES

Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co., 331 U.S. 519 (1947) 16

Brown v. Board of Ed. of Topeka, 347 U.S. 483 (1954) 3

Buckley v. Valeo, 424 U.S. 1 (1976) 12

Devlin v. Scardetti, 536 U.S. 1 (2002) 3, 16

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) 12, 20

International Union, United Automobile, Aerospace and Agricultural Implement Workers v. Scofield, 382 U.S. 205 (1965) 16

Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589 (1967) 12

Meyer v. Nebraska, 262 U.S. 390 (1923) 14

Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1941) 17

Missouri v. Jenkins (Jenkins I), 495 U.S. 33 (1990) 12, 22

Montoy v. State (Montoy II), 102 P.3d 1160 (Kan. 2005) 1, 7

Montoy v. State (Montoy III), 112 P.3d 923 (Kan. 2005) 1, 8

Montoy v. State (Montoy IV), 138 P.3d 755 (Kan. 2006) 1

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 11, 12, 14

Nixon v. Shrink, 528 U.S. 377 (2000) 11, 12

V. TABLE OF AUTHORITIES – Continued

Page

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 14, 15

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 21

San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 11, 14

U.S.D. 229 v. State, 885 P.2d 1170 (Kan. 1994), *cert. denied*, 515 U.S. 1144 (1995) 5, 7

Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926) 21

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 21

Zelman v. Simmons-Harris, 336 U.S. 639 (2002) 16

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I, § 1 ..... 1, 21

U.S. Const. Amend. XIV, § 1 ..... 1, 2, 20, 21, 22

U.S. Const. Art. IV, § 4 ..... 1, 21

Kan. Const. Art. 6, § 6 ..... 2, 8, 21

STATE AND FEDERAL REGULATIONS

28 U.S.C. § 1257(a) 1

K.S.A. 72-6405 et seq. 4

K.S.A. 72-6433(b)(9)(B) 2

VI. OPINIONS AND ORDERS BELOW

The Opinion of the Supreme Court of Kansas, dated January 3, 2005, is reported at *Montoy v. State* (*Montoy II*), 102 P.3d 1160 (Kan. 2005). App. 81. The Opinion of the Supreme Court of Kansas, dated June 3, 2005, is reported at *Montoy v. State* (*Montoy III*), 112 P.3d 923 (Kan. 2005). App. 38. The Order of the Supreme Court of Kansas, dated June 15, 2006, is unreported. App. 1. The Opinion of the Supreme Court of Kansas dated July 28, 2006 is reported at *Montoy v. State* (*Montoy IV*), 138 P.3d 755 (Kan. 2006). App. 2.

VII. JURISDICTION

On June 15, 2006, the Kansas Supreme Court denied Petitioners' Motion to Intervene without opinion. App. 1. On July 28, 2006, that Court entered an order dismissing the school finance case and releasing jurisdiction. App. 2. This Court has jurisdiction under 28 U.S.C. § 1257(a).

VIII. CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment to the United States Constitution provides in relevant part that: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. Amend. I, § 1.

2. The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.

3. Article 6 § 6 to the Kansas Constitution provides in relevant part: "The legislature shall make suitable provision for the finance of the educational interests of the state. . . . " Kan. Const. Art. 6 § 6.

6. The Kansas school finance statutes in relevant part are set out in the Appendix to the Petition. K.S.A. 72-6433(b)(9)(B). App. 92.

IX. STATEMENT OF THE CASE

> "The year was 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else. All this equality was due to the 211th, 212th, and 213th Amendments to the Constitution, and to the unceasing vigilance of agents of the United States Handicapper General."
>
> – by Kurt Vonnegut, *Harrison Bergeron* (1961) attached in Appendices. App. 95.
>
> "My story mocks the idea of legally eliminating envy by outlawing excellence, which is precisely what the legislature means to do in the public schools, by putting a cap on local spending on them. Should it prevail it will be possible for me to say there are no longer any truly excellent public schools in all of Kansas. Talk about a level playing field!"

– by Kurt Vonnegut, Unpublished Letter to the Editor of the *Lawrence Journal-World*, dated May 12, 2005 attached hereto in the Appendices. App. 94.

This case may be the most important litigation since *Brown v. Board of Education,* 347 U.S. 483 (1954). Nowhere is the juxtaposition of the two most revered constitutional values, liberty and equality, more at war and in desperate need of constitutional reconciliation than in this case. Here we have the question: How do you strike the proper balance between the liberty and equality interests of parents and local school districts who are willing and able to do more for their children than what the state is willing or able to provide and the equality interests of those parents and school districts who are unwilling or unable to do so? More importantly, who gets to decide that question – a state's highest court or this Court?[1]

At bottom, this case asks whether it is constitutional for a state to impose on public education spending caps which, in effect, handicap some school districts who the state perceives, wrongly, as privileged or advantaged, to achieve the appearance of equality among all school districts? More importantly, is it constitutional for a state

[1] As discussed herein, if petitioners are bound by the Kansas Supreme court decisions, then they should be treated as a "party," not as strangers to the action, because they, in effect, are non-named class members whose interests were not adequately represented by the existing parties to the litigation and who timely objected to the arguments advanced by plaintiffs on their behalf at the earliest opportunity after they became aware of them. *Devlin v. Scardetti,* 536 U.S. 1 (2002) (holding that non-named class members were entitled to appeal without first intervening when petitioners' interests were not adequately represented by existing parties).

to impose mandatory spending caps, not to prevent some school districts from being better than others, but to force some school districts into a permanently disadvantaged state by prohibiting the taxpayers within under funded districts from using their own money to fund the difference? When a state first deprives some of its children of an equal learning opportunity and then wrests from their parents the freedom to use their own money to make up the difference, does such oppressive state action violate the federal guarantee of equal protection and substantive due process?

1. Historical Background.

In 1992, seven years prior to the filing of the underlying lawsuit, the Kansas legislature amended the school finance statutes to create a system of funding public education whereby all schools in the state would receive comparable per pupil operating expenditures. Before then, dating back to Kansas's statehood in the 1800s all school districts in the state had been funded entirely from local property taxes, and the per pupil operating expenditures widely varied between school districts. Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq.* These 1992 amendments changed the system of funding public education by redistributing tax revenue from local property, sales and income taxes to all school districts in the state according to a weighted formula. The formula established a foundational level of education to which all children in Kansas were entitled – the per pupil base rate. App. 85.

The Act included a supplemental means for funding educational services called the Local Option Budget

("LOB"). The LOB permitted local school districts to seek voter approval for additional local taxes to improve the education in that district. The Kansas school finance formula, however, set a ceiling on the amount of money any local school district could raise in local taxes for public education. This ceiling is known as the cap on the local option budget (the "Cap"). App. 13.

In 1992, the Blue Valley Unified School District No. 229 challenged the legislature's school finance formula as unconstitutional, including the cap on local spending. *U.S.D. 229 v. State*, 885 P.2d 1170 (Kan. 1994), *cert. denied*, 515 U.S. 1144 (1995). Applying a rationality standard of review, the Kansas Supreme Court concluded that all the funding differentials within the school finance formula were rationally related to a legitimate governmental objective and, therefore, were constitutional under both the state and federal constitutions. App. 85.

Seven years later, in 1999, plaintiffs filed the underlying lawsuit against the State of Kansas, the Kansas State Board of Education, and various state officials responsible for enforcing the statute, again challenging the school finance scheme as unconstitutional under both the state and federal constitutions. This time, however, the court came to the opposite conclusion. App. 81, 88. At trial, the court accepted plaintiffs' federal equal protection argument and held that the school finance formula was not rationally related to a legitimate governmental purpose and caused a disparate impact on minority children. App. 84. The trial court concluded that the plaintiffs had proven that the insufficiency of funding was a proximate cause of the plaintiffs' poor performance on standardized tests. The court was persuaded by plaintiffs' argument that the "achievement

gap" proved plaintiffs were receiving a constitutionally inadequate and inequitable level of education. App. 88-89. The "achievement gap" is the difference between higher test scores on standardized tests taken by Caucasian students, on average, and the test scores of minorities, bilingual, and special education children.

Plaintiffs argued that one of the most significant factors contributing to low standardized test scores for plaintiff school districts was large class sizes. The trial court agreed that class sizes in large to midsize school districts had become "too large for adequate learning to take place."[2] The district court concluded, therefore, that the Kansas School District Finance and Quality Performance Act was unconstitutional.

This gross class size disparity was not unique to the plaintiff school districts, however. Petitioners' districts had even larger average class sizes than the plaintiff school districts. The cap prevented petitioners' school districts from achieving small class sizes commensurate with low enrollment districts as well and prohibited them from achieving the most important condition for improved learning – small class sizes.[3]

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[2] (*See* Plaintiffs-Appellees brief at 34, 58, *citing* R. XXIII 447, R. XLII, 602, R. XLIV, 3263-64) ("Dodge City, Garden City, Wichita, Topeka, and Kansas City all now have pupil teacher ratios ranging from 17 to 1 to 22 to 1 compared to the significantly lower 7 to 1 and 12 to 1 pupil teacher ratios for some of the low-enrollment districts.").

[3] December 2005 Legislative Post Audit Committee Cost Analysis, Executive Summary, p.23. The Kansas Supreme Court referenced this report in its 7/28/06 final opinion. The report concluded that small class size is the only proven determinant of improved academic performance: "Four of Five class size studies we reviewed found that smaller classes

(Continued on following page)

Plaintiffs' legal strategy, however, was to argue to the court that petitioners' school districts neither needed nor deserved additional funding. App. 66. Plaintiffs painted a picture of class warfare between "rich" school districts and "poor" school districts and repeatedly described to the court a disparity between "the haves and have nots."[4]

The reality was, however, that while petitioners' schools were located in a property-rich area, their schools were not wealthy. On a comparative basis, the plaintiff school districts were, in fact, wealthier than petitioners' school districts because they received more money from the state in per pupil operating expenditures than did the non-party school districts. Shawnee Mission students for example receive $6,833, whereas Dodge City's students receive $8,216, over a $1,000 per pupil difference. *See* Ks. Board of Education's Per Pupil Expenditure Comparison By District for 2005-2006 school year.

On March 24, 2004, the defendants appealed to the Kansas Supreme Court, and on January 3, 2005, the court, in effect, overruled its earlier decision in *U.S.D. 229* and affirmed the district court in part, concluding that the legislature had failed to make suitable provision for the finance of the public schools as required by Article 6, § 6 of the Kansas constitution. *Montoy v. State*, 102 P.3d 1160 (Kan. 2005) (*Montoy II*). App. 81, 84. As a consequence, the court ordered the legislature to pass new legislation which would infuse substantially more money into public education

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led to improved academic outcomes . . . Studies of factors other than class size were less consistent."

[4] *See* 4/4/05 Letter from plaintiffs to the Kansas Supreme Court, p.4.

and reallocate state funds according to new "guidelines," *i.e.*, (1) the actual costs of funding "an adequate education" and (2) equity. App. 90.

The court stayed the issuance of the mandate to allow the legislature a reasonable time to correct the constitutional infirmity in the school finance formula and set a deadline of April 12, 2005 for that to be accomplished. App. 90-91. The legislature responded by enacting changes to the school finance formula on March 30, 2005 (2005 H.B. 2247 [L. 2005, ch. 152], modified by 2005 S.B. 43 [L. 2005, ch. 194] [collectively referred to as H.B. 2247]). *See Montoy v. State*, 112 P.3d 923 (Kan. 2005) (*Montoy III*). App. 38.

For the first time since 1992, the legislature addressed the specific needs of many non-party school districts, including petitioners' school districts, by enacting local funding provisions beneficial to these school districts. These new local funding provisions were known as: (1) a new extraordinary declining enrollment factor, (2) an *increase* in the cap on the local option budget, and (3) a cost of living *increase* for teachers who live and work in relatively more expensive urban areas (collectively, the "local funding provisions"). App. 61-64, 65-67.

On June 3, 2005, however, the Kansas Supreme Court held that the changes made by H.B. 2247 failed to bring the state's school financing formula into compliance with Article 6 § 6 of the Kansas constitution. App. 75-80. Most alarming was the court's stay of the new local funding provisions, including the increased cap, passed by the legislature in H.B. 2247. App. 79. The court stated:

> HB 2247's increased dependence on local property taxes, as decided by each school district, exacerbates disparities based on district wealth. **We fully acknowledge that once the legislature has provided suitable funding for the state school system, there may be nothing in the constitution that prevents the legislature from allowing school districts to raise additional funds for enhancements** to the constitutionally adequate education already provided. At least to the extent that funding remains constitutionally equalized, **local assessments for this purpose may be permissible**. ***Clearly, however, such assessments are not acceptable*** as a substitute for the state funding the legislature is obligated to provide under Article 6 § 6. That should pre-exist the local tax initiatives. (emphasis added.) App. 69..

Thereafter, on July 6, 2005, the legislature enacted S.B. 3 (L. 2005 Special Session, ch. 2), and in a subsequent opinion, the court ruled that it, in effect, complied with the court's June 3, 2005 order, for "interim purposes" only. App. 11. The court retained jurisdiction to review further legislative action in the 2006 session. Thereafter, the legislature enacted changes to the school finance formula yet again in S.B. 549 (L. 2006, ch. 197), which was signed by the governor on May 19, 2006.

On July 28, 2006, the court determined that with S.B. 549, the legislature had complied with its prior orders and dismissed the appeal with instructions to the trial court to dismiss the case. App. 24. Although the court lifted the stay, the court, in effect, upheld the cap on the local option budget, and the cap continues in operation to this day. The court's conditions on the operation of local funding provisions also continue in force. App. 26.

2. The manner of presenting the federal questions.

Although plaintiffs challenged the Kansas school finance statutes on behalf of all children in Kansas, petitioners never received notice of the lawsuit. App. 83-84. Moreover, the rules governing class actions, joinder of parties and claims, including necessary and indispensable parties, appear to never have been followed.

Plaintiffs, in effect, acted as class representative but did not adequately represent the interests of petitioners. Plaintiffs opposed allowing any local taxation for public education and, in the remedial phase of the case, vigorously opposed removal, or lessening, of the cap in any way. They urged the Court to redistribute funding away from petitioners' schools to their own schools. Their interests could not have been more adverse. The state defendants also failed to adequately represent petitioners' interests since they obviously sought to uphold the school finance scheme, including the cap, as constitutional.

The first time petitioners became aware of the underlying lawsuit was when they read about it in the newspapers sometime after the Kansas Supreme Court's January 3, 2005 surprising ruling. App. 81. At that time, petitioners had no reason to suspect that the Court would change its holding from its prior controlling precedent. More importantly, it was not until the Court's June 3, 2005 Decision that there was ever any hint that using local taxation for public education, while constitutional, was nevertheless inequitable and as such, impermissible. App. 69-79.

Petitioners first tried to protect their interests by filing an *amicus curiae* brief during the court's briefing schedule prior to its June 3, 2005 Decision. App. 43. Then,

on June 13, 2006, petitioners filed a Motion to Intervene. App. 1.

The federal questions pressed by petitioners were clear and precise and are quoted in relevant part below:

> "In *Rodriguez,* the United States Supreme Court expressly reserved the question of the constitutionality of state ceilings on local taxation which inhibit under-funded schools from improving their per pupil operating expenditures. The high Court expressly stated it would address that issue 'another day' . . . "

1. Equal Protection Analysis.

> In 1973, the United States Supreme Court decided *San Antonio Sch. Dist. v. Rodriguez,* 411 U.S. 1 (1973), . . . Justice White stated that he believed a state's ceiling on local taxation presented a federal constitutional question for under funded schools. As he observed,
>
> > But state [Texas] law places a . . . ceiling on the . . . tax rate, a limit that would surely be reached long before Edgewood (the plaintiff school district) attained an equal yield [to other school districts]. Edgewood is thus precluded in law, as well as in fact, from achieving a yield even close to that of some other districts. *Rodriguez*, 1 U.S. at 67.

2. Substantive Due Process Analysis.

> For the reasons stated by Justice Stevens in *Nixon v. Shrink,* 528 U.S. 377 (2000) and the United States Supreme Court in *Moore v. City of East Cleveland,* 431 U.S. 494 (1977) the Kansas cap on expenditures for public education is

unconstitutional under a substantive due process analysis because the cap unduly interferes with the fundamental rights of citizens to spend their own money on something they value, i.e., improvement of their children's local public education. *Nixon,* 528 U.S. at 398-399, *citing, Moore v. City of East Cleveland,* 431 U.S. 494, 513 (1977).

3. First Amendment Analysis.

The Kansas legislature's purpose in setting a ceiling on local taxes for improving public education is allegedly to equalize funding among school districts throughout the state for public education. . . . However, in *Buckley v. Valeo,* 424 U.S. 1 (1976), the United States Supreme Court rejected government imposed spending caps for similar egalitarian purposes as unconstitutional deprivations of liberty under the First Amendment. . . . The point was an uninhibited, wide-open, robust marketplace of ideas was compromised by such expenditure caps. *See Keyishian v. Board of Regents of the University of the State of New York,* 385 U.S. 589 (1967) (public education as a locus for the uninhibited, wide-open, robust marketplace of ideas deserving First Amendment protection).

4. Procedural Due Process.

The federal Constitution imposes an 'inherent equitable limitation' on a state court's remedial power through the Due Process Clause of the 14th Amendment . . . [which this Court violated in] staying the local funding provisions, citing, *Missouri v. Jenkins (Jenkins I),* 495 U.S. 33 (1990) and *Honda Motor Co. v. Oberg,* 512 U.S. 415 (1994)."

Petitioners now seek *certiorari* to review the Kansas Supreme court's denial of their intervention in this case. For all intents and purposes, petitioners were non-named class members who were foreclosed from intervening of right in public interest litigation and barred from asserting their own claims at the time the Kansas Supreme Court was determining the constitutionality of the school finance statutes and fashioning relief. App. 83-84. As virtual class members, petitioners are entitled to appeal. Petitioners, therefore, seek review of the state Supreme court's decisions.

X. REASONS FOR GRANTING THE WRIT

A. This case raises important issues of national significance by seeking to test the constitutionality of a State's efforts to create equality in its public school system by depriving some children, who the State perceives, wrongly, as privileged or advantaged, of equal protection and fundamental liberties guaranteed to them under the Constitution.

In a nation founded on individual liberty, self-government, and local initiative, it is inconceivable that a state would prohibit any community from enhancing public education through civic self-sacrifice and collective democratic action, but Kansas has done just that. The state's unstated, but ostensible, purpose is to make the state's public education uniform, but it accomplishes this goal by obstructing its citizens' freedom to use their own money to educate their children.

An objective observer might wonder how there could be any harm if children in one district or any district got "too much" education. Maybe the thinking is that if children learn "too much," that is, if they excel, then, by definition, they will no longer be "equal," which outcome must, according to the state, be prevented by severely rationing the funds certain districts may raise from local taxpayers. The state's remedy is to impose an artificial economic burden – a "cap" (read handicap) – to insure that the spending per student remains artificially low and cannot be overcome by the concerted democratic action of local citizens.

Kansas is not alone. At least five other states also impose spending caps on public education.[5] This Court has long held, however, that a parent's ability to "do more for one's children," including the "freedom to devote more money to the education of one's children," is a fundamental right under the Federal Constitution. *San Antonio Sch. Dist. v. Rodriguez,* 411 U.S. 1, 48 (1973); *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). When the Kansas Supreme Court upheld the state law capping local school taxes at 27-31% of the

[5] Alaska, AK Stat. 14.17.410(c)(1) & (2) (23% spending cap); Colorado, CRS 22-54-108(3)(b)(1) (20% cap on total program funding from local sources); Kentucky, KRS, 157.440(2)(a) (no more than 30% of the district's budget can come from local levy); Minnesota, Minn. Stat. 126 C. 17(2) (any additional per pupil spending raised through local resources must not exceed 18.2% of the district's total formula allowance); Montana, MCA 20-9-308. In contrast, the majority of states appear to either not impose such caps on total spending for public education or if they do, the caps can be overridden by a vote of the local taxpayers.

state's funding level for a school's operating budget, a federal question was triggered because Kansas's cap on local taxation deprives Kansas citizens of fundamental federal rights.

Now Kansas citizens who vote to tax themselves more for the education of their children will be in violation of the state law and, arguably subject to punishment. We still are free to spend unlimited amounts on things that are not in the best interests of our children, like spectator sports, video games, and junk food, but it is illegal for petitioners to democratically vote an additional school tax upon themselves for the purpose of improving the education of all the children in their districts. Thus, the state ceiling on local taxation strips them of their political freedom.

As a result of the Kansas Supreme Court's rulings, petitioners will now be attending schools that are purposely under funded by the state and have some of the highest average class sizes in the state. They are forbidden to use their own local funds to offset this disparity. Yet, they are still required to fund the education of children in districts that are not under funded and in which class sizes are measurably smaller. App. 2-37.

Ironically, the constitution forbids outlawing private schools; therefore, the wealthy can spend unlimited sums on their children's private education – a disparate, but constitutional, result. *See Pierce v. Society of Sisters,* 268 U.S. 510 (1925). The constitution also prohibits outlawing vouchers, which means private schools already are subsidized with public funds. The "freedom of choice" of parents

to educate their children in either public or private schools is a superior constitutional value and therefore justifies this disparate, but constitutional, result. *See Zelman v. Simmons-Harris,* 336 U.S. 639 (2002). However, if the average Kansas family wants to *support* their public schools through higher voluntary local taxes, they cannot do so. This "choice" is somehow less worthy of constitutional protection.

Petitioners had an absolute right to be involved as parties in the underlying action and appeal. Any remedy the Kansas Supreme Court fashioned would impact petitioners. App. 83-84. Petitioners were entitled to be involved to defend their interests and make their constitutional claims.

The Kansas Supreme Court's refusal to permit petitioners' intervention to assert this federal question under the unique circumstances in this case, therefore, deprived petitioners of due process because it foreclosed petitioners' access to the courts. *See Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers v. Scofield,* 382 U.S. 205, 215-216 (1965). Although the Kansas Supreme Court did not permit petitioners to be parties to the appeal, they normally would be bound by the Kansas Supreme Court's adverse judgment and decrees. *Devlin v. Scardetti,* 536 U.S. 1 (2002) (stating that non-named class members, like petitioners, who have objected at the earliest opportunity after first learning of the class representative's adverse positions on behalf of the class have the power to bring an appeal without first intervening); *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.,* 331 U.S. 519, 524 (1947) (intervention is of right if petitioner is legally bound by the decision and adversely affected by it "there being no other way in which he can better assert the particular

interest which warrants intervention. . . . [A]nd since petitioner cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal. . . ."); *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 508 (1941) ("[O]ur jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the right. If the right is absolute, then the order is appealable, and we may judge it on its merits.").

A related constitutional question, therefore, is: Are petitioners bound by the Kansas Supreme Court's ruling that: "[While] there may be nothing in the constitution that prevents the legislature from allowing school districts to raise additional funds for enhancements. . . . At least to the extent that funding remains constitutionally equalized, local assessments for this purpose may be permissible. . . . ***[Until then, however] such assessments are not acceptable***?" Thus, the Court seems to regard local taxation to be "unacceptable" unless, or until, the legislature first funds a "constitutionally adequate education." App. 69. "That should preexist the local tax initiatives." App. 69.

In this extraordinary ruling, the Court, in effect, admits the local funding provisions are constitutional, "we fully acknowledge . . . there may be nothing in the constitution that prevents the legislature from allowing school districts to raise additional funds. . . ." App. 69. However, even though they are constitutional, the court still prohibits them as "unacceptable" because the court believes such self-help would be "disequalizing." App. 7, 63. If petitioners are bound by this, they are entitled to appeal the judgment.

The Kansas Supreme Court never defined what comprises a constitutionally adequate base education, however. App. 31-34. As Justice Rosen stated in his concurring opinion, " . . . the decisions in this case demonstrate that the model for a constitutionally adequate education has not been a stationary, definable concept." App. 34. It is a "moving target." App. 33. Therefore, petitioners' fundamental federal right to increase the funds available for the education of their children is in limbo, effectively held hostage by the Kansas Supreme Court, pending an undetermined definition of an adequate base level of education. App. 31.

While petitioners are seeking relief in federal court, any lower federal court might require petitioners to exhaust all of their administrative remedies, including an appeal to this Court, before seeking relief there. As a practical matter, the Court's ruling already did and likely will again chill future legislation to expand local funding provisions or remove the cap entirely. App. 24.

The Court's Decisions already induced the legislature to adopt preferential treatment for other school children's needs, not based on any objective or neutral criterion but, instead, based upon improper classifications of race, national origin, and learning disabilities. App. 19, 84-85, 88. Plaintiffs' entire case at trial and on appeal was premised on the "achievement gap" between minority, bilingual, and special education children versus Caucasian students. App. 19, 84-85, 88. The remedy the Kansas Supreme Court ordered was intended to correct this "achievement gap" by forcing the state to reallocate more state aid to those school districts with a higher proportion of these categories of students. App. 19, 84-85, 88. Thus, the funding scheme devised by the legislature, at the direction of the Court, involved a kind of reverse discrimination.

In contrast, a suspect-class neutral remedy would not have ordered additional funding to those districts having higher proportions of minority, bilingual, or special education children, but instead would have ordered additional funding according to objective and race-neutral performance-based criterion which would be directed at the problem – non-proficiency on standardized tests, not the color of a child's skin. In this way, all children scoring below the proficiency level would receive equal treatment. Alternatively, ordering sufficient funding for smaller class sizes in those districts lacking small average class sizes similarly would have been a race-neutral remedy proportionate to solving the alleged wrong.

B. This case involves an important question of federal law that has not been, but should be, decided by this Court with respect to the constitutional limits on a state court's adjudication of the constitutionality of a state's school finance scheme under that state's constitution because if left undisturbed, the Kansas Supreme Court's decisions disrupt the balance of power within our federalist system and interfere with the constitution's preservation of individual liberties.

The legal battle regarding the adequacy of and equity in funding K-12 public education is raging across the country in state courts with conflicting results.[6] App. 25-26. This battle involves claims by state legislators that the court is usurping its authority to make policy in public school finance. This battle is particularly intense in

[6] *The Validity of Public School Funding Systems*, 110 A.L.R. 5th 293 (2006 Supp.).

Kansas. Many in the Kansas legislature have proposed constitutional amendments to limit judicial authority or want to require elections of judges in the future.[7]

Thus, the *Montoy* decisions pose a constitutional crisis. By ignoring common law restrictions on its equitable power, the Court engaged in arbitrary adjudication. As in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), where this Court struck down a highest state court's *interpretation* of the state constitutional amendment on Fourteenth Amendment procedural due process grounds because of the state's utter disregard of common law limitations on remedial discretion, so here too, the Kansas Supreme Court's opinions and orders fail to comply with the traditional common law equitable doctrine limiting a state court's remedial discretion to the least obtrusive means to democratic governance to remedy the constitutional wrong. This absent procedure would "provide protection against arbitrary and inaccurate adjudication."

The equitable common law doctrine restrieting a judicial remedial decree to the least restrictive means to remedy the alleged constitutional wrong would not have permitted the Kansas Supreme Court to stay or condition local funding, a means not causally related to the court's alleged end. Local funding is not harmful to the plaintiff school districts and is beneficial to other school districts that need additional funding for public education to achieve per pupil expenditures comparable to those enjoyed by a majority of other school districts in the state.

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[7] *See, e.g.*, "Judicial Rulings Raise Ire," 8/24/06, *N.E. Johnson County Sun*, Vol. 56, No.34, p. 1A, 7A; "Penalty Right for Nuss," 8/24/06, *N.E. Johnson County Sun*, Vol. 56, No.34, p. 7A; www.sunpublications.com.

App. 24. Conditioning local funding on the state first funding an undefined base level of education indefinitely suspends petitioners' liberty and property rights. It is, therefore, an excessive and arbitrary remedy. The Federal Constitution requires a more narrow tailoring of the Kansas Supreme Court's remedial decrees to comport with the Fourteenth Amendment Due Process Guarantee.

Unlike the situation in *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980), where this Court held that a state court can interpret a state constitution's first amendment more broadly than the federal equivalent and thereby augment free speech rights beyond what the Federal Constitution would protect, the state constitutional provision at issue here does not protect such negative rights, *i.e.*, individual liberties. Rather, Article 6 § 6, of the Kansas Constitution involves a governmental benefit, *i.e.*, public education.

Since the Kansas Supreme Court's interpretation of the Education Article unduly impinges on petitioners' federal liberty and property rights, it contravenes the First and Fourteenth Amendments. As this Court in *Pruneyard* stated, "Our reasoning . . . does not . . . limit [a state's] sovereign right to adopt in its own Constitution *individual liberties* more expansive than those conferred by the Federal Constitution ***so long as*** [they do not] contravene any other federal constitutional provision." *Id.* at 81 (citing *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (emphasis added)).

Thus, this case involves issues of vast national importance regarding preserving the balance of power within our federalist system of government – a balance of power

designed to secure individual liberty. These issues are too vital to this nation to allow the Kansas Supreme Court Decisions to go unchallenged.

As Justice Kennedy forewarned:

> This assertion of judicial power in one of the most sensitive of policy areas, that involving taxation, [for public education] begins a process that over time could threaten *fundamental alteration of the form of government our constitution embodies. Missouri v. Jenkins (Jenkins I)*, 495 U.S. 33, 81. (Emphasis added.)

When this Court talks about a court's remedial authority being exercised in such a way that "over time [the exercise of such power] could threaten fundamental alteration of the form of government our constitution embodies," then fundamental freedoms protected by the Fourteenth Amendment's Due Process Guarantee are at stake.

In the end, petitioners ask very little. They recognize their civic duty to help fund other school districts located in less property-rich areas and willingly hand over their taxes for this purpose. They also enthusiastically support state funding for those districts, which, like petitioners, lack the necessary learning conditions proven to correlate with higher test scores, *i.e.*, small class sizes. However, what is intolerable is the state's concerted effort to arbitrarily, unjustifiably, and unreasonably restrict their ability to voluntarily tax themselves to pay for additional teachers to reduce class sizes – a benefit which the state provides to others but intentionally withholds from petitioners.

Absent the requested constitutional protection, Kansas succeeds in outlawing excellence and making a mockery of equality.

XI. CONCLUSION

For the reasons stated above, the Court should grant *certiorari*.

Respectfully submitted,

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SUPREME COURT ORDER

DISTRICT CASE NO. 99C1738 S

IN THE SUPREME COURT

OF THE STATE OF KANSAS

DANIEL D CRABTREE
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10975 BENSON
OVERLAND PARK KS 66210

CASE NO. 04-92032-S

RYAN MONTOY, ET AL.,
APPELLEES/CROSS-APPELLANTS,

V.

THE STATE OF KANSAS, ET AL.,
APPELLANTS/CROSS-APPELLEES.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT: MOTION TO INTERVENE BY INDIVIDUAL STUDENTS AT USD #512 AND USD 229. DENIED. RESPONSE NOTED.

DATE: 06/15/2006.

CAROL G. GREEN
CLERK

IN THE SUPREME COURT OF
THE STATE OF KANSAS

No. 92,032

RYAN MONTOY, *et al.*,

Appellees / Cross-appellants,

v.

STATE OF KANSAS, *et al.*,

Appellants / Cross-appellees.

Appeal from Shawnee district court; TERRY L. BULLOCK, judge. Opinion filed July 28, 2006. Appeal dismissed and remanded with directions.

Alok Ahuja, of Lathrop & Gage L.C., of Overland Park, and *Stephen R. McAllister,* special assistant attorney general, argued the cause, and *Jeffrey R. King,* of Lathrop & Gage L.C., of Overland Park, *David W. Davies,* assistant attorney general, and *Phill Kline,* attorney general, were with Alok Ahuja on the briefs for appellant/cross-appellee State of Kansas.

Dan Biles, of Gates, Biles, Shields & Ryan, P.A., of Overland Park, argued the cause, and *Rodney J. Bieker,* of Kansas Department of Education, was with him on the briefs for appellants/cross-appellees Janet Waugh, Sue Gamble, John Bacon, Bill Wagnon, Connie Morris, Kathy Martin, Kenneth Willard, Carol Rupe, Iris Van Meter, Steve Abrams, and Bob Corkins.

Alan L. Rupe, of Kutak Rock LLP, of Wichita, argued the cause, and *Richard A. Olmstead,* of the same firm, and *John S. Robb,* of Somers Robb & Robb, of Newton, were with him on the brief for appellees/cross-appellants.

Patricia E. Baker and *David C. Cunningham,* of Kansas Association of School Boards, of Topeka, were on the brief for *amicus curiae* Kansas Association of School Boards.

Lara M. Owens and *Mark R. Thompson,* of Seigfreid, Bingham, Levy, Selzer & Gee, P.C., of Kansas City, Missouri, were on the brief for *amicus curiae* Kansas Families United for Public Education.

David M. Schauner and *Robert M. Blaufuss,* of Kansas National Education Association, of Topeka, were on the brief for *amicus curiae* Kansas National Education Association.

Stephen R. McAllister and *Todd N. Thompson,* of Thompson, Ramsdell & Qualseth, P.A., of Lawrence, were on the brief for *amicus curiae* Legislative Coordinating Council.

Bernard T. Giefer, of Giefer Law LLC, of WaKeeney, was on the brief for *amici curiae* Unified School District No. 208, Trego County, Kansas (WaKeeney), *et al.* (126 other Kansas school districts).

Bradley R. Finkeldei and *Peter C. Curran,* of Stevens & Brand, L.L.P., of Lawrence, were on the brief for *amicus curiae* Unified School District No. 229 (Blue Valley School District).

Thomas R. Powell and *Roger M. Theis,* of Hinkle Elkouri Law Firm L.L.C., of Wichita, were on the brief for *amicus curiae* Unified School District No. 259, Sedgwick County, Kansas.

Anne M. Kindling, of Goodell, Stratton, Edmonds & Palmer, L.L.P., of Topeka, was on the brief for *amicus curiae* Unified School District No. 512, Shawnee Mission, Kansas.

Per Curiam: This is the fifth time this case has been before this court since the district court *sua sponte* dismissed the case on November 21, 2001. In that initial appeal by the plaintiffs, we reversed the district court and remanded the case for further proceedings in *Montoy v. State,* 275 Kan. 145, 62 P.3d 228 (2003) (*Montoy I*). On remand, the district court held that the Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq.,* was unconstitutional. The defendants appealed, and on January 3, 2005, this court affirmed the district court in part, concluding that the legislature had failed to make suitable provision for the finance of the public schools as required by Article 6, § 6 of the Kansas Constitution. *Montoy v. State,* 278 Kan. 769, 120 P.3d 306 (2005) (*Montoy II*). We stayed the issuance of the mandate to allow the legislature a reasonable time to correct the constitutional infirmity in the school finance formula and set a deadline of April 12, 2005, for that to be accomplished.

Although we held that increased funding would be required, we did not dictate the manner in which the legislature should amend the financing formula to bring it into constitutional compliance, noting, as did the district court, that "there are 'literally hundreds of ways' the financing formula can be altered to comply with Art. 6, § 6." 278 Kan. at 775. However, we did make it clear that the actual costs of providing a constitutionally suitable education and the equity with which the funds are distributed are critical factors for the legislature to consider in crafting a suitable formula for financing public education. 278 Kan. at 775.

The legislature responded by enacting changes to the school finance formula on March 30, 2005. (2005 H.B. 2247 [L. 2005, ch. 152], modified by 2005 S.B. 43 [L. 2005, ch.

194] [collectively referred to as H.B. 2247].) See *Montoy v. State,* 279 Kan. 817, 819, 112 P.3d 923 (2005) (*Montoy III*). H.B. 2247 provided a funding increase of approximately $142 million for the 2005-06 school year.

The changes made by H.B. 2247 included modifications to the weighting components of the finance formula and changes to the authority of certain districts to raise revenue through local ad valorem property taxes. H.B. 2247 modified the funding formula by increasing the Base State Aid Per Pupil (BSAPP), bilingual, and at-risk weightings; phasing in increases in special education funding; eliminating the correlation weighting (while retaining the low enrollment weighting); and providing for annual adjustments to general state aid funding levels in accordance with the Consumer Price Index-Urban (CPI-U).

With respect to local revenue generating provisions, H.B. 2247 provided for incremental increases in the 25 percent cap on local option budgets (LOB) over the following 3 years to 30 percent in the 2007-08 school year; authorized districts with high housing costs to levy a "cost-of-living" ad valorem tax to pay enhanced teacher salaries; and authorized districts with extraordinary declining enrollment to apply to the Board of Tax Appeals (BOTA) for permission to levy an additional ad valorem tax.

H.B. 2247 also provided for a cost study to be performed by the Legislative Division of Post Audit to "'determine the costs of delivering the kindergarten and grades one through 12 curriculum, related services and other programs mandated by state statute in accredited schools.'" 279 Kan. at 821.

After the new legislation became law, this court issued an order to show cause directing the parties to address whether the amendments to the financing formula met the legislature's constitutional obligation to "'make suitable provision for financing'" of the public schools. 279 Kan. at 820. The parties were directed to address whether the actual costs of providing a suitable education were considered with respect to each component of the formula, as well as the formula as a whole, "and whether H.B. 2247 exacerbates and/or creates funding disparities among the districts." 279 Kan. at 820.

After an expedited briefing and argument schedule, on June 3, 2005, this court held that the changes made by H.B. 2247 failed to bring the state's school financing formula into compliance with Article 6, § 6 of the Kansas Constitution. 279 Kan. at 840. This court considered each component of the formula, the new local ad valorem tax authorizations, and the overall funding provided by the changes as a whole and held that although H.B. 2247 provided a significant funding increase, it still failed to provide constitutionally suitable funding for public education because the changes were not based on considerations of the actual costs of providing a constitutionally adequate education and exacerbated existing funding inequities. 279 Kan. at 839-40.

Specifically, this court found that the increases in the BSAPP, at-risk weighting, bilingual weighting, and special education funding all varied substantially from the cost information in the record, and that the State had failed to provide any cost basis to support the amount of funding provided. 279 Kan. at 831-33, 839. Further, this court noted that the low enrollment weighting was not altered, and although we had specifically sought cost justifications

for this significant funding component, none was provided. 279 Kan. at 836.

Moreover, this court found certain components of the amended formula exacerbated unjustified inequities in the distribution of funding. For example, we found that the funding disparity caused by the low enrollment weighting was exacerbated by the elimination of the correlation weighting for middle-sized and large districts. By rolling those funds into the BSAPP, low enrollment districts were given "even more of the funds that previously were devoted to balancing the disparities in per pupil funding caused by the low-enrollment weighting." 279 Kan. at 836.

We also found that "H.B. 2247's increased dependence on local property taxes, as decided by each school district, exacerbate[d] disparities based on district wealth." 279 Kan. at 839.

We held that the new cost-of-living property tax provision was not based on any evidence that there was any link between high housing costs and higher education costs or that the 17 districts that would benefit from the provision pay higher teacher salaries. We noted that the evidence at trial demonstrated the opposite – that the districts with high-poverty, high at-risk student populations are the ones that need help attracting and retaining teachers. 279 Kan. at 835.

This court also held that H.B. 2247's two extraordinary declining enrollment provisions were potentially "extremely disequalizing because they are unlimited and have been designed to benefit a very small number of school districts." 279 Kan. at 838.

With respect to the increase in the LOB cap, this court found that the failure to provide for equalizing state aid for the new level of LOB authority worsened wealth-based disparities between districts, because districts with high assessed property values can generate maximum LOB revenues with far less tax effort than districts with lower assessed property values and median family incomes. 279 Kan. at 834.

Moreover, this court found it significant that H.B. 2247 did not attempt to correct the problem identified in *Montoy II,* namely, that unconstitutional underfunding has forced some districts to "use the LOB to fund the State's obligation to provide a constitutionally adequate education rather than enhancements," as the LOB was originally intended. 279 Kan. at 834.

This court also concluded that the Legislative Division of Post Audit (LPA) cost study provided for by H.B. 2247 was insufficient to determine the actual and necessary costs of providing a constitutionally suitable education because it would examine only the cost of "inputs" – the curriculum, programs, and related services required by law, and would not consider the costs of "outputs" – the cost of achieving measurable standards of proficiency. 279 Kan. at 842-43. Accordingly, the court required the cost study to incorporate the costs of outputs in addition to the statutorily mandated elements of a K-12 education. 279 Kan. at 843.

Because time was running out for school districts to prepare for the 2005-06 school year, there was no evidence of the actual costs of a suitable education other than the Augenblick & Myers (A&M) study, and the litigation had been pending since 1999, this court accepted the A&M study "as a valid basis to determine the cost of a constitutionally

adequate public education" and ordered the legislature to implement for the 2005-06 school year a minimum funding increase of $285 million above the 2004-05 funding level, which included the $142 million provided by H.B. 2247. 279 Kan. at 844-45. The $285 million increase represented one-third of the $853 million estimated cost of implementing A&M's recommendations.

Deferring to the cost study analysis to be performed by LPA, this court held that implementation of the remaining two-thirds of the A&M recommendation would be contingent upon the results of the LPA study. However, absent compliance, this court stated we would consider ordering an increase in funding of the remaining $568 million for the 2006-07 school year, in addition to other remedies. 279 Kan. at 846.

This court also ordered a stay on the increased LOB cap, the cost-of-living weighting, and both extraordinary declining enrollment provisions, due to their potential to exacerbate inequities in funding. 279 Kan. at 846. We retained jurisdiction, stating that further action, if necessary "will be taken by this court as is deemed advisable to ensure compliance with this opinion." 279 Kan. at 847.

The governor then called the legislature into special session. See Governor's Proclamation of June 9, 2005. By July 2, 2005, the legislature had failed to comply with this court's June 3, 2005, opinion, so we issued an order directing the parties to appear on July 8, 2005, and show cause "why this Court should not enter an ORDER enjoining the expenditure and distribution of any funds for the operation of Kansas schools pending the Legislature's compliance with this Court's June ruling regarding minimum

funding increases for the 2005-06 school year." *Montoy,* Order of July 2, 2005.

Thereafter, on July 6, 2005, the legislature enacted S.B. 3 (L. 2005 Special Session, ch. 2), which provided a funding increase of $147 million over the $142 million provided by H.B. 2247.

With respect to the various components of the formula, S.B. 3 increased the BSAPP by another $35 to $4,257; increased the at-risk weighting from .145 to .193; increased funding for special education by raising the excess cost reimbursement from 88 percent in 2006-07 to 92 percent; lowered the enrollment cut-off for the low enrollment weighting from 1,725 students to 1,662; restored the correlation weighting with a threshold of 1,622 students; eliminated the cap on LOB equalizing supplemental state aid and increased access to LOB equalization for districts with lower property valuations by raising the AVPP entitlement from the 75th percentile to the 81.2 percentile; replaced the extraordinary declining enrollment (EDE)-BOTA provision with a similar declining enrollment provision that applies more broadly to any district with a decline in enrollment from the previous year; and provided for matching state aid for districts with lower property valuations.

S.B. 3 also amended the cost study provision to require the LPA to conduct two cost studies: One would study the cost of inputs, and the other would estimate the cost of meeting student performance outcome standards adopted by the State Board of Education (Board). See K.S.A. 2005 Supp. 46-1131.

The parties appeared before the court on July 8, 2005. The issue before the court at the July 8 proceeding was

whether the new legislation complied with this court's June 3, 2005, order for a minimum funding increase. At that hearing, all parties agreed that S.B. 3 complied with the court's June 3, 2005, order.

On July 8, 2005, this court held: "The legislature, by enacting S.B. 3, has complied with our June 3 opinion regarding the minimum funding increase" for the 2005-06 school year, and we approved the school finance formula, as amended by H.B. 2247 and S.B. 3, "for interim purposes." *Montoy,* Order of July 8, 2005. Further, because S.B. 3 increased LOB equalization and provided increased access to such equalization, this court lifted the stay on the provision increasing the LOB authority. Order of July 8, 2005. The stay on the EDE-BOTA provision was lifted as well, because S.B. 3 replaced it with a new provision designed to benefit a larger number of districts. The stays on the cost-of-living weighting and the EDE-Joint Committee on State Building Construction (JCSBC) provisions, however, were continued.

This court retained jurisdiction "to review further legislative action which may modify, repeal, or make permanent the temporary solution contained in S.B. 3." Order of July 8, 2005.

On January 9, 2006, LPA completed and submitted to the legislature the cost study report commissioned by H.B. 2247/S.B. 3. As pointed out by the State in its argument before this court, the legislature referred to this report throughout its 2006 session and sought further input and explanation from LPA during the session.

Thereafter, the legislature enacted changes to the school finance formula in S. B. 549 (L. 2006, ch. 197), which was signed by the governor on May 19, 2006.

The plaintiffs then filed a motion for a show cause order and briefing schedule, and on May 22, 2006, this court ordered the parties to brief and argue the issue whether S.B. 549 satisfies our court's prior orders.

Rather than modifying the provisions of S.B. 3/H.B. 2247, the legislature materially and fundamentally changed the way K-12 is funded in this state.

S.B. 549 adopted a 3-year funding scheme for K-12. It also alters the formula components by creating two additional at-risk weightings: the high-density at-risk weighting which provides additional at-risk funding for districts with high percentages of at-risk students; and the nonproficient at-risk weighting, which provides $10 million in additional funding in 2006-07 for students who are not proficient in reading or math, but are not classified as at-risk (eligible for the federal free lunch program).

An additional fundamental change occurred in providing flexibility to local districts to spend money received for at-risk, preschool at-risk, and bilingual education programs interchangeably. More significant are the changes that S.B. 549 made in the LOB.

The school finance formula provided a feature designed to equalize the ability of districts with lower property wealth to raise money through the use of the LOB. The formula was designed so that districts with an assessed valuation per pupil (AVPP) below the 75th percentile would receive supplemental aid in an amount designed to bring them up to par with the district at the 75th percentile of AVPP. Under this formula, districts with an AVPP above the 75th percentile would not receive supplemental state aid. K.S.A. 72-6434.

The legislature has increased equalization in two ways. First, it increased the LOB equalization threshold from the 75th percentile to the 81.2 percentile of AVPP. K.S.A. 2005 Supp. 72-6434(a). Accordingly, districts with an assessed valuation per pupil below the 81.2 percentile would receive supplemental aid on the LOBs in an amount designed to bring those districts up to par with the districts at the 81.2 percentile of AVPP.

Second, the 25 percent LOB cap on supplemental general state aid was eliminated. See S.B. 3, sec. 12 (b). In S.B. 549, the LOB authority was increased to 30 percent for the 2006-07 school year and 31 percent for 2007-08 and thereafter. An election would be required to adopt an LOB in excess of 31 percent. S.B. 549 did not change the AVPP threshold and did not impose a limit on equalization supplemental aid.

S.B. 549 further requires that such supplemental state aid be used to meet accreditation requirements, provide programs required by law, and improve student performance. S.B. 549, sec. 20(e)(1). The 3-year cumulative total of such aid under S.B. 549 is $74 million. Added to H.B. 22471S.B. 3's increase of $47.7 million, the estimated increase since *Montoy II* is $121.7 million.

Under the prior structure, LOB state aid funding has never been considered part of the foundation level of funding provided by the State for a district's basic operating expenses. However, S.B. 549 now requires that supplemental state aid be applied to meet basic educational requirements, essentially making LOB state aid part of the foundation level of funding.

Further, the original intent and purpose of the LOB (which would necessarily include LOB state aid) was to

allow individual districts to fund enhancements to a constitutionally adequate education provided and financed by the funding formula. *Montoy III*, 279 Kan. at 834 (citing *Montoy II*, 278 Kan. at 774). S.B. 549, however, now provides that school districts are required to use LOB state aid moneys to fund basic educational expenses.

The plaintiffs point out that these changes to the LOB state aid do not provide new money and are nothing more than a "money renaming scheme." Regardless of whether LOB state aid is new money, the point is that these changes to the equalizing state aid provisions of the LOB component of the formula fundamentally alter the structure of the funding system.

In addition, S.B. 549 increases the BSAPP from $4,257 to $4,316 in 2006-07; to $4,374 in 2007-08; and to $4,433 in 2008-09. That amounts to an increase of $101.25 million over the 3 years, and $183.75 million since January 3, 2005. The low enrollment weighting adjustment was lowered to 1,637 pupils in 2006-07 and 1,622 pupils in 2007-08 and 2008-09. The high enrollment weighting (formerly the correlation weighting) threshold was lowered to correspond to the changes in the low enrollment weighting, resulting in $18.5 million over the 3-year period.

At-risk weighting was increased to 0.278 for 2006-07, 0.378 for 2007-08, and 0.456 for 2008-09, resulting in an estimated 3-year cumulative increase of $152.55 million. The 3-year total for high-density at-risk is $29.6 million. Bilingual weighting remained unchanged at .395 (based upon the number of student contact hours in a bilingual program). Special education excess costs reimbursement is set at 92 percent, totaling an estimated $80.3 million over 3 years, and $111.5 million since January 3, 2005. S.B. 549

provides an estimated total funding increase of $466.2 million. The total increase in funding since January 3, 2005, is an estimated $755.6 million.

S.B. 549 leaves intact the cost-of-living weighting, which is a new local property tax levy intended to allow districts with higher regional costs to raise additional revenue, purportedly to fund higher teacher salaries, although the requirement that funds be used for that purpose was removed from the statute. See 279 Kan. at 835. While we stayed the effect of this provision last year due to concerns about wealth-based disparities, nevertheless, this new component alters the funding formula.

We begin our analysis by addressing the State's first argument that (1) the school finance formula challenged by the plaintiffs no longer exists, and thus, the case is moot, and (2) this court cannot engage in the fact finding necessary to determine the constitutionality of S.B. 549. The first argument was raised in *Montoy III,* and we rejected it because this case was and continues to be in the remedial stages, or to be more precise, the compliance stage. It continues to have no merit, and we again reject it.

As to the State's second part of the argument, we agree that this court is an appellate court and not a fact-finding court. The constitutionality of S.B. 549 is not before this court. It is new legislation and, if challenged, its constitutionality must be litigated in a new action filed in the district court. We have already made the determination that the school finance formula which was before this court in *Montoy II* was unconstitutional. The school finance system we review today is not the system we reviewed in *Montoy II* or *Montoy III.* The sole issue now before this court is whether the legislation passed in 2005

and S.B. 549 comply with the previous orders of this court. If they do then our inquiry ends and this case must be dismissed. A constitutional challenge of S.B. 549 must wait for another day.

The State argues alternatively that the legislature has been highly responsive to the court's orders in enacting the 2005 legislation and S.B. 549 and, therefore, the appeal should be dismissed. It points out that the 2005 legislation and S.B. 549 together provide annual increased funding by the 2008-09 school year of $755.6 million over that provided in 2004-05. The State further asserts the manner in which the funds are to be distributed is directly responsive to the concerns expressed by the court in its prior orders regarding at-risk students, special education students, and middle- and large-sized districts. The State also urges the court to lift the stay on the cost-of-living weighting.

Although noting it has some concerns with S.B. 549, the State Board of Education contends that S.B. 549, in conjunction with the changes made by the 2005 legislation, makes "suitable provision for finance" of the public schools as required by Article 6, § 6 of the Kansas Constitution, as construed by this court, and requests the court to release jurisdiction of the case.

The plaintiffs contend that S.B. 549 fails to comply with this court's prior orders and fails to make suitable provision for finance of the public schools as required by Article 6, § 6 of the Kansas Constitution. The plaintiffs contend the funding increases and formula components of S.B. 549 are not based on the actual and necessary costs of providing a suitable system of finance of public education and do not distribute funding equitably, exacerbating existing constitutional deficiencies.

Specifically, the plaintiffs contend that S.B. 549's funding for the 2006-07 school year is not based on actual and necessary costs because the funding it provides under the components of the formula is significantly less than the funding increase LPA concluded to be the actual and necessary costs of meeting the mandated performance standards for 2006-07. As a remedy, the plaintiffs request that we order the legislature to implement the LPA Cost Study Analysis outcomes based recommendations for the 2006-07 school year.

The State contends that in determining whether S.B. 549 complies with this court's orders, it would be inappropriate for the court to rely on the LPA Cost Study Analysis as evidence of actual costs because it is not part of the record on appeal, and the validity of its conclusions have not been subjected to expert analysis and judicially determined through operation of the fact-finding process.

The plaintiffs contend the LPA Cost Study Analysis is part of the legislative history of S.B. 549 and, therefore, may properly be considered by the court. They argue that this court may accept the LPA Cost Study Analysis as substantial competent evidence of the actual and necessary costs of achieving the State Board's mandated proficiency standards because it was designed and funded by the legislature, performed by its employees, subject to its direction, and presented to the legislature.

First, we reject the State's contention that we may not consider the LPA Cost Study Analysis in determining whether the legislature complied with our orders. Although the LPA Cost Study Analysis is not evidence in the record on appeal, it is part of the legislative history of S.B. 549. *Cf., Urban Renewal Agency v. Decker,* 197 Kan. 157,

160, 415 P.2d 373 (1966) (historical background, legislative proceedings, and changes in a statute during course of enactment may be considered by the court in determining legislative intent).

The LPA Cost Study Analysis was commissioned by the legislature in order to assist in determining the actual costs of providing a suitable funding system. The legislature dictated the parameters of the study, the study was conducted by its employees, subject to the legislature's direction and oversight, the study was presented to the legislature early in the 2006 session, and there was an ongoing dialogue between the legislature and LPA concerning the study during the course of the legislative session. See Memorandum of April 21, 2006 from LPA to all legislators. See also K.S.A. 2005 Supp. 46-1131 (commissioning LPA to conduct the Cost Study Analysis, setting the parameters of the study, and directing LPA to submit its report to the legislature by a date certain or request additional time); K.S.A. 46-1101 (legislative post audit committee comprised of five senators and five members of the house of representatives); K.S.A. 46-1102 (LPA headed by the post auditor, who is appointed by the legislative post audit committee); and K.S.A. 46-1103 (establishing LPA, and providing that its employees are under the direct supervision of the post auditor in accordance with the policies adopted by the legislative post audit committee).

Accordingly, we may consider the LPA cost study as part of the legislative history of S.B. 549 in determining legislative intent as it is relevant to the question whether the legislature has complied with our orders in this case. That does not mean, however, that we may consider the findings and conclusions in the report as substantial competent

evidence of the actual and necessary costs of providing a suitable education.

The cost study has not been subjected to the fact-finding processes of litigation through which the parties were permitted to examine the validity and accuracy of the study, including the methodology and policy decisions supporting the study, the qualifications of the persons participating in the study, the assumptions underlying the study's conclusions, and the veracity of the underlying data. Although such inquiry is vital to determining the validity of the study's conclusions and the degree of weight to accord the study if offered at trial in the district court, this is an extraordinary appeal and the legislature had the opportunity to analyze the methodology and policy decisions of the LPA Cost Study Analysis, and thus to accept or reject its findings as a factor in determining what is suitable finance for the Kansas school system.

There is no question that the legislature has substantially responded to our concerns that the funding formula failed to provide adequate funding for students in middle-sized and large districts with a high proportion of minority and/or at-risk and special education students and that the special education, bilingual, and at-risk student weighting factors were distorted by the lack of any actual cost basis.

S.B. 549 and the 2005 amendments together provide an estimated annual increased funding by the 2008-09 school year of $755.6 million over that provided in 2004-05. Of that total, $246 million – almost one-third – is directed to at-risk students: $206.5 million in new funding by 2008-09 has been provided through increases in the at-risk weighting from .10 to .456 by 2008-09; $29.6 million in additional at-risk funding is directed to districts with high percentages

of at-risk students; and $10 million is provided to students who, though not classified as "at-risk" under the free lunch eligibility criteria, nevertheless are not proficient in math or reading, based on statewide proficiency assessments.

Bilingual funding has been increased from .2 to .395, adding $11 million in new funding as of 2005-06. Further, and significantly, the new legislation provides districts with the ability to use at-risk and bilingual funding interchangeably, giving districts with these students greater flexibility to use those funds to meet their needs.

Special education excess cost reimbursement has been increased from 85 percent at the time of *Montoy II* to 92 percent, and provides by 2008-09 an additional $111.5 million in new funding.

The legislature also responded to our concerns about the equitable distribution of funding. Equity does not require the legislature to provide equal funding for each student or school district. In *Montoy II,* we rejected the plaintiffs' claim that the school finance act violated the Equal Protection Clause of the United States and Kansas Constitutions. What is required is an equitable and fair distribution of the funding to provide an opportunity for every student to obtain a suitable education.

Our concerns about the low enrollment weighting were addressed by reducing its relative significance in the funding formula by increasing funding to middle- and large-sized districts with high percentages of special needs students. The legislature has substantially increased the at-risk weighting, including the new high-density weighting designed to provide additional funding to middle- and large-sized districts with high percentages of at-risk students. S.B. 549 and the 2005 amendments together

have provided non-low enrollment districts with an additional $47 million in new funding through the high enrollment weighting (formerly the correlation weighting), while reducing entitlement to the low enrollment weighting by lowering the cut-off from to 1,725 pupils to 1,622 by 2007-08. In addition, we note that by restoring and increasing the high enrollment weighting, the legislature was directly responsive to our concern in *Montoy III* that the elimination of the correlation weighting exacerbated the disparities caused by the low enrollment weighting.

Further, the legislature responded to our concerns about wealth-based disparities inherent in the LOB by increasing the equalizing LOB state aid AVPP percentile.

Our prior orders have made it clear that we were concerned that the then existing financing formula was distorted and provided disparate funding because it was based on former spending levels with little or no consideration of the actual costs and present funding needs of Kansas public education.

The legislature has responded to this concern. The legislature has undertaken the responsibility to consider actual costs in providing a suitable system of school finance by commissioning the LPA to conduct an extensive cost study, creating the 2010 Commission to conduct extensive monitoring and oversight of the school finance system, and creating the School District Audit Team within LPA to conduct annual performance audits and monitor school district funding as directed by the 2010 Commission. In addition, the new legislation contains numerous provisions designed to improve reporting of costs, expenditures, and needs.

These new components provide the fundamental framework for a cost-based funding scheme in which the legislature will be regularly provided with the relevant, accurate information necessary to meet its constitutional obligation to provide and maintain a suitable system of financing of Kansas public schools.

We also find that the LPA Cost Study Analysis was considered by the legislature in making the decisions that underlie the formula changes in S.B. 549 and, thus, the legislature was responsive to our prior orders to consider actual costs. We note the plaintiffs' contention that because S.B. 549 does not provide funding at the levels recommended by LPA's cost study, it was not based on actual costs and, therefore, fails to provide constitutionally suitable funding. However, implicit in that argument is the conclusion that the LPA Cost Study Analysis is credible evidence of the actual costs of education. As discussed above, we cannot reach that conclusion.

Nonetheless, as we stated in *Montoy II*: "It is clear increased funding will be required; however, increased funding may not in and of itself make the financing formula constitutionally suitable." 728 Kan. 775. Further, in *Montoy III* we said:

"As set forth earlier in this opinion, the Legislative Division of Post Audit has been commissioned to conduct a comprehensive and extensive cost study to be presented to the 2005-06 legislature. With such additional information available, the legislature should be provided with the cost information necessary to make policy choices establishing a suitable system of financing of Kansas public schools.

"We conclude, however, that additional funding must be made available for the 2005-06 school year to assist in

meeting the school districts' immediate needs. We are mindful of the Board's argument that there are limits on the amount the system can absorb efficiently and effectively at this point in the budget process." 279 Kan. at 845.

The legislature is not bound to adopt, as suitable funding, the "actual costs" as determined by the A&M and LPA studies. On the other hand, the legislature cannot ignore the LPA study as it did the A&M study. In commissioning the cost study, the legislature clearly stated in H.B. 2247, Section 3:

"'(a) In order to assist the legislature in the gathering of information which is necessary for the legislature's consideration when meeting its constitutional duties to: (1) Provide for intellectual, educational, vocational and scientific improvement in public schools established and maintained by the state; and (2) make suitable provision for the finance of educational interests of the state, the division of post audit shall conduct a professional cost study analysis to determine the costs of delivering the kindergarten and grades one through 12 curriculum, related services and other programs mandated by state statute in accredited schools.'" 279 Kan. at 840-41.

We are mindful of the fact that the funding of public education is extraordinarily complex, just as we are mindful of the realities of the legislative process. We conclude that the legislature's efforts in 2005 and in 2006 S.B. 549 constitute substantial compliance with our prior orders, through which it will have provided by 2008-09 at least 755.6 million additional dollars to the education of the State's most precious asset – our children.

The determination that the funding system failed to provide for suitable funding of the public schools as required by Article 6, § 6 of the Kansas Constitution was the culmination of an extensive 8-day bench trial of this case before the district court, with testimony generating over 1300 pages of transcripts, and over 300 exhibits consisting of thousands of pages, a large number of which were spreadsheets and other documents showing the financial operation and impact of the funding formula for school districts statewide. All of this evidence pertained to the issue at hand – whether the school funding formula as it existed at that particular time was constitutional. Our opinion affirming the district court's determination on that issue was made on the basis of that extensive record.

As previously noted, in response to our orders, the legislature has amended the school finance formula three times. The most recent changes made in S.B. 549 have now so fundamentally altered the school funding formula that the school finance formula that was at issue in this case no longer exists. It has been replaced with a fundamentally different funding scheme for which there are no facts and figures in the record from which we could determine how it will operate over the next 3 years.

We recognize that we could remand this case to the district court to allow the plaintiffs to amend their pleading to challenge the new funding formula. However, we decline to do so, electing instead to end this litigation. We do so for two reasons.

First, we note the point made by the Chief Justice of the Ohio Supreme Court in *DeRolph v. State:*

"A review of sixteen other state Supreme Court decisions that have declared their systems for funding public education unconstitutional reveals that a majority of those decisions remanded the case to a trial court. However, it is those states that have had the most difficulty producing a final plan that met the Supreme Court's opinion of constitutionality. For example, in New Jersey the issue has been through the courts for a period of twenty years and is now again pending in the New Jersey Supreme Court. Similar experiences, though not as dramatic, have occurred in Arizona, Arkansas, California, New Hampshire and Texas. In each of these states, either the final public school funding plan is not yet approved by the Supreme Court of the state after several years of litigation after remand or the plan has been approved only after several years of litigation." *DeRolph v. State*, 78 Ohio St. 3d 419, 421-422, 678 N.E.2d 886, 888 (Ohio 1997) (Moyer, C.J., concurring in part and dissenting in part) (disagreeing with the majority's decision to remand the case to the district court pending legislative compliance so the trial court could hear evidence concerning the remedy after it is enacted and determine any new legislation's constitutionality).

See also *Abbott v. Burke,* 119 N.J. 287, 575 A.2d 359 (1990) (*Abbott II*) (Public School Education Act held unconstitutional); *Abbott v. Burke,* 136 N.J. 444, 643 A.2d 575 (1994) (*Abbott III*) (court ordered legislature to enact constitutional system and retained jurisdiction); *Abbott v. Burke,* 149 N.J. 145, 199-200, 693 A.2d 417 (1997) (*Abbott IV*) (thereafter, court ordered interim increased funding and remanded the case to district court for hearings on the special needs of urban students and to determine the costs of funding those needs); *Abbott by Abbott v. Burke,* 153 N.J. 480, 710 A.2d 450 (1998) (*Abbott V*) (on appeal from

district court decision after extensive hearings, court ordered specific, detailed, comprehensive reform plan); *DeRolph v. State*, 78 Ohio St. 3d 193, 213, 677 N.E.2d 733 (1997) (*DeRolph I*) (remanded to district court pending legislative compliance); *DeRolph v. State,* 89 Ohio St. 3d 1, 36-38, 728 N.E.2d 993 (2000) (*DeRolph II*) (on appeal after extensive proceedings in trial court, court allowed the State more time to continue to refine system, set out areas of concern to address, and retained jurisdiction).

Second, S.B. 549 is a 3-year plan; thus, it may take some time before the full financial impact of this new legislation is known, a factor which would be important in any consideration of whether it provides constitutionally suitable funding. Indeed, as the Board's attorney pointed out at oral argument, we do not even know at this time how districts used the funding increase provided by the 2005 amendments.

The previous orders of this court affirming the judgment of the district court in part and reversing in part are reaffirmed in this opinion. We lift the stays imposed on the cost-of-living weighting and the extraordinary declining enrollment-Joint Committee on State Building Construction Provision. We dismiss this appeal and remand to the district court with directions to dismiss the pending case.

NUSS, J., not participating.

ROSEN J., concurring: Every child in Kansas has a fundamental right to an education guaranteed by the Kansas Constitution. I, therefore, agree with the concurrences to *Montoy v. State,* 278 Kan. 769, 120 P.3d 306 (2005) (*Montoy II*), previously filed by Justices Beier, Davis, and Luckert. In addition to their thorough constitutional analysis, I note that every child is mandated to

attend school. K.S.A. 2005 Supp. 72-1111. Our legislature has required all Kansans with control over or charge of a child to send that child to school. K.S.A. 2005 Supp. 72-1111. This requirement upon parents and guardians for the compulsory education of their children is paralleled by the requirement upon the legislature to provide that same constitutionally mandated education. Likewise, the citizens of Kansas through our state constitution have imposed a duty on the legislature to "make suitable provision for finance of the educational interests of the state." Kan. Const., Art. 6, § 6(b). It is our duty, as the arbiters and champions of the Kansas Constitution, to enforce each child's fundamental right to an education. Any analysis of the issues in this case must necessarily begin with an understanding of this right and the duties associated with that right.

Further, I concur with the majority's conclusion that S.B. 549 (L. 2006, ch. 187) complies with this court's prior orders and order to dismiss this case. I write separately to express my disagreement with the majority's analysis for concluding that S.B. 549 complies with this court's prior orders; to express my concern with including equalizing local option budget (LOB) state aid as part of the State's funding obligation; and to note my disagreement with the dissent remanding this case to the district court.

I disagree with the majority's analysis for concluding that S.B. 549 (L. 2006, ch. 197) complies with this court's prior orders. Although the majority opinion highlights the increase in funding for various categories of students, the analysis provides no linkage between those increases and the actual costs as determined by the Division of Legislative Post Audit (LPA) study or the Augenblick & Myers (A&M) study. I recognize that the legislature has appropriated

substantially more money to the State's school system. However, this court did not simply order the legislature to appropriate substantially more money.

In *Montoy II,* this court required the legislature to consider the "(1) actual costs of providing a constitutionally adequate education and (2) funding equity" to fulfill its constitutional duty for making a "suitable provision for finance of the educational interests of the state." 278 Kan. at 775. The *Montoy III* court further ordered that the cost study commissioned by the legislature to be performed by the LPA incorporate consideration of the costs of outputs in addition to inputs. 279 Kan. at 843.

LPA completed a study in January 2006, estimating the costs for providing an education based on four different models, including three inputs-based models, distinguished by class size, and one outputs (or outcomes)-based model. Although the results of the LPA study may be considered as part of the legislative history for determining legislative intent, I agree with the majority's analysis that we cannot consider the study as evidence because it has not been subjected to the fact-finding process of litigation. Nevertheless, the completion of the LPA cost study substantially complies with our order in *Montoy III.*

According to the LPA study, the costs of educating Kansas children using an outcomes-based model requires an additional $399 million in state funding for the 2006-07 school year. The legislature thereafter enacted S.B. 549, which provides a 3-year plan for increasing school funding by approximately $466.2 million. In the first year of the plan, 2006-07, the legislature increased school funding by $194.5 million. In the second year of the plan, 2007-08, the

increase is $149 million, and in the third year of the plan, 2008-09, the increase is another $122.7 million.

The plaintiffs argue that the legislature has fallen well short of the $399 million in additional funding necessary to meet the outcomes-based model costs for the 2006-07 school year. The State and the Kansas Board of Education (Board), on the other hand, argue that S.B. 549 substantially complies with this court's order to consider the actual costs of education because it was based on the results of LPA's cost study. To support their argument, the State and the Board assert that the overall state funding provided for 2006-07 will exceed the $399 million increase recommended in the LPA study. However, their argument depends on the inclusion of equalizing LOB state aid as part of the State's funding obligation in accordance with section 20 of S.B. 549. Because LPA did not include equalizing LOB state aid as part of the State's funding for basic operating costs when it calculated the amount of increased funding needed for the outcomes-based education model, the State and the Board argue that the $399 million figure must be reduced by the amount of equalizing LOB state aid.

According to the State and the Board, in 2005-06, the State provided $222 million in equalizing LOB state aid. The State argues that after deducting the $222 million from LPA's recommended increase of $399 million, the total funding increase would be reduced to approximately $180 million. Because S.B. 549 provides $194.5 million in new funding for the 2006-07 school year, the State and the Board assert that the legislature has exceeded LPA's recommended funding increase.

Upon closer scrutiny of the State's figures, it appears the State's calculation fails to account for approximately $38 million. This is because LPA's $399 million figure does not include the approximately $38 million in additional equalizing LOB state aid that would be required if LPA's funding recommendation were adopted. The new funding provided by S.B. 549, however, does include that $38 million increase. Nevertheless, this discrepancy is not significant enough to alter my analysis. If LPA's $399 million figure is adjusted to include an additional $38 million in increased LOB state aid funding, and $222 million is deducted from that, LPA's recommendation, as adjusted, would be $215 million.

When that figure is compared with the $194.5 million funding increase provided by S.B. 549 for 2006-07, there is substantial compliance with LPA's recommended funding increase for the outcomes-based model. Accordingly, I conclude that the State has substantially complied with this court's order to consider the "actual costs of providing a constitutionally adequate education." *Montoy III,* 279 Kan. at 830.

In addition to requiring the State to consider the actual costs for providing a constitutional education, this court required the funding to be equitably distributed. *Montoy II,* 278 Kan. at 775. I find that the legislature has been responsive to our order to provide for equitable distribution of funding in two significant ways. Our equity concerns included disparate funding between the low enrollment districts and the middle- and large-sized districts with high percentages of special needs students. I agree with the majority that the significant increases in funding directed to the middle- and large-sized districts has reduced the relative significance of the low enrollment

weighting in the formula. The legislature has also responded to our concerns about LOB inequities due to property value disparities by raising the assessed valuation per pupil (AVPP) from the 75th percentile to the 81.2 percentile for equalizing LOB state aid. K.S.A. 2005 Supp. 72-6434(a).

However, I have some concern with the new provisions of S.B. 549 that include equalizing LOB state aid as part of the State's funding toward meeting its constitutional requirement to suitably fund public education. My concern centers on the fact that in order to receive LOB state aid, districts have to impose a local property tax levy by enacting an LOB. Essentially, the State is arguing that allowing local districts to levy property taxes as a condition for receiving equalizing LOB state aid is synonymous with providing state funding. However, because the LOB is optional and some school boards or taxpayers may reject a local tax to support their school district, children in districts in which base level funding is inadequate and in which an LOB is not adopted, or is not adopted at the full cap, may not have the funds necessary for a constitutionally adequate education. In other words, if equalizing LOB state aid would be necessary to fund a district's basic educational costs, and a district or its voters choose not to adopt LOB funding in full or in part, the legislature has not met its constitutional duty to those children in that district. Counting equalizing LOB state aid as part of the State's foundation funding in essence shifts the legislature's constitutional responsibility to the local school districts. While the legislature may constitutionally allow local districts to choose to provide extras beyond the minimum constitutionally adequate education, *Montoy III*, 279 Kan. at 839, it cannot allow districts to choose to fund

less. By including equalizing LOB state aid to establish that S.B. 549 provides adequate funding, the legislature is essentially making the LOB funding mandatory in those districts where a constitutionally adequate education is not provided by base level state funding.

As of 2003, all but four of the Kansas school districts have opted into the LOB funding, and many were at the maximum cap as it then existed. Because there is such a high level of participation in the LOB funding, my concern about the equalizing LOB state aid does not alter my conclusion that S.B. 549 substantially complies with our order to consider actual costs and equitably distribute the State's education funding. However, so long as the legislature allows the LOB to remain an optional funding source rather than a mandatory one, my concern may be relevant in any subsequent challenge to the funding formula as amended by S.B. 549. In the school districts that receive less than the base level of state funding and which would have been eligible for equalizing LOB state aid but do not adopt an LOB at all, or adopt an LOB in an amount lower than the amount necessary to generate the funding shortfall, the State is arguably still responsible for providing constitutionally adequate funding. If other school districts begin opting out in part or in full of the LOB funding, the equitable distribution of state funding may be at risk. Such heavy dependence on a local contribution has historically caused disparity and equity concerns which have led to Kansas school finance litigation, including this case. We must never again allow a funding scheme that makes the quality of a child's education a function of his or her parent's or neighbors' wealth.

The inclusion of equalizing LOB state aid in S.B. 549 provides an essential financial log in keeping afloat the

raft of adequate funding for the education of Kansas children. However, if local communities at some future time decide to remove that log, the delicate raft will have a difficult time remaining afloat, and, again, the constitutional right of all Kansas children to a suitably funded education could soon find itself imperiled.

I further note my disagreement with the dissenting position that this case should be remanded for factfinding. Although I agree that the LPA study cannot be considered as evidence, I reject the conclusion that we cannot evaluate the legislature's compliance with this court's prior orders without remanding the matter. Following the dissent's analysis, we could only evaluate the legislature's compliance with this court's prior orders if the legislature had followed the A&M study because it was the only cost study in evidence. If this court had intended to require adherence to the A&M study, it should not have deferred further consideration pending the completion of the new cost study, as it did in *Montoy III*.

In rejecting the dissenting position, it is important to note that I am not accepting the LPA study as a model for a constitutionally adequate education. The A&M study estimated the costs for an educational model based on certain inputs and outcomes. The LPA study, on the other hand, estimated the costs for completely different educational models, either based on inputs or outcomes, but not a combination of the two. Without evidence and expert opinions regarding the adequacy of each LPA educational model, this court cannot conclude that the LPA model would provide a constitutionally adequate education. If we were to require such evidence before making a decision, we would find ourselves trying to hit a moving target unless each new cost study estimated the costs for exactly the

same educational model. However, the decisions in this case demonstrate that the model for a constitutionally adequate education has not been a stationary, definable concept.

In *Montoy I,* this court ruled that accreditation standards may not be an adequate model. 275 Kan. at 155. In *Montoy II,* the court reiterated that accreditation standards may not always be adequate and then relied on the legislature's own definition of "suitable education" in K.S.A. 46-1225(e) (statute authorizing A&M study) to conclude that the standard was not being met. 278 Kan. at 774-75. In *Montoy III,* this court adopted the educational model from the A&M study as a constitutionally adequate education. *Montoy III,* 279 Kan. at 844. However, the *Montoy III* court also interjected another educational model by requiring the legislature to estimate the costs for achieving the outputs as necessary elements of a constitutionally adequate education. The *Montoy III* court also defined a constitutionally adequate education in accordance with K.S.A. 72-6439, the statute that requires the Kansas Board of Education to adopt an accreditation system based upon an improvement in performance.

As long as the target model for a constitutionally adequate education continues to move, the litigation in this case could continue in perpetuity. Each new cost study based on a new model would require factual testing at the district court before this court could determine whether the amended legislation is constitutional. Such a process would extend into an indefinite future, and the children of Kansas need a resolution of this matter now. Therefore, based on my analysis that the legislature has substantially complied with this court's prior orders, I concur with the result of the majority opinion dismissing this case.

BEIER, J., concurring in part and dissenting in part: I concur with much in the majority's opinion, including its implicit decision not to interfere with immediate implementation of 2006 S. B. 549 (L. 2006, ch. 197). Implementation must proceed, pending further order of this court. As we have previously observed, time is of the essence. Kansas school administrators, employees, and students need to plan for the coming school year and those that follow, with the assurance that the state funds promised by the legislature and governor by way of S.B. 549 will actually be forthcoming.

I respectfully dissent from the majority's decision to dismiss this action, leaving for another day in a future lawsuit the determination of whether S.B. 549 meets the standard of Article 6, § 6 of the Kansas Constitution. That issue is alive in this action. Constitutionality has always been and remains squarely presented. Further, our earlier opinions and orders in this case consistently and correctly equated compliance with this court's directives to adherence to the legislature's constitutional mandate. I am not willing to divorce these concepts now. If the State has demonstrated compliance with our directives, the legislature has corrected the constitutional deficiencies in the Kansas design for school finance. The converse would also be true: If the State has not demonstrated compliance with our directives, the legislature has not corrected the constitutional deficiencies in the school finance design. Logically and legally, if we meant what we have said, one cannot be satisfied without the other.

Reduced to its essence, our June 3, 2005, Supplemental Opinion had two components. The first dealt with the need for increased funding in the 2005-06 school year. That component is moot. The second component dealt with

constitutionality of Kansas' school finance design beyond the 2005-06 school year. With regard to that component, we said:

"[I]f (1) the post audit study is not completed or timely submitted for the legislature to consider and act upon it during the 2006 session, (2) the post audit study is judicially or legislatively determined not to be a valid cost study, or (3) legislation is not enacted which is based upon actual and necessary costs of providing a suitable system of finance and which equitably distributes the funding, we will consider, among other remedies, ordering that, at a minimum, the remaining two-thirds ($568 million) in increased funding based upon the [Augenblick and Myers] (A&M) study be implemented for the 2006-07 school year." *Montoy v. State,* 279 Kan. 817, 846, 112 P.3d 923 (2005).

The problem facing the parties and this court now is that, on the appellate record before us, we cannot know the status of (2) or (3) above. The soundness of the methodology and conclusions of the Legislative Division of Post Audit (LPA) cost study have not been tested by a typical adversary process. No evidence has been admitted on the ways in which the members of the legislature considered actual and necessary costs or equity. Without testimony and documentary evidence in the record to evaluate on these matters, this court simply cannot conclude the State has carried the burden placed upon it last year to demonstrate that the legislature's actions brought Kansas' school finance system into compliance with the state constitution. The appropriate way to respond is not to throw the plaintiffs out of court. It is to retain jurisdiction, acknowledge the factual deficiencies of the record, and remand to the district court for further proceedings focused on the constitutionality of the finance system, as altered by S.B. 549.

The district court proceedings could include any necessary substitution or realignment of parties, amendment of pleadings, appropriate discovery, and, finally, trial. Such a trial would, among other things, test the methodology and conclusions of the LPA study and the soundness of legislators' consideration of it in their crafting of S.B. 549. It would also give us a record on the actual adequacy and equity effects of S.B. 549, including the redesignation of local option budget equalization aid, a redesignation never mentioned by any party in 2005 but upon which the State now wishes us to rely heavily to dismiss this case. Such a trial, and the careful study of the district court, also could illuminate whether a need for further remedial action persists, and, if so, what form it should take.

There is no question that the legislature has made substantial efforts to improve the adequacy and equity of our school finance system. The political realities of the legislative process make perfection unattainable, and no amount of money committed to public education will ever solve all of the problems of Kansas' urban poor or of its rural communities losing population. Still, because I am unwilling to graft a "good enough for government work" phrase onto Article 6, § 6 of our state constitution, I would permit this case to continue in the district court, where it may be finally resolved or prepared for further, much better informed review by myself and my colleagues.

LUCKERT, J., joins in the foregoing concurring and dissenting opinion.

END

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 92,032

RYAN MONTOY, *et al.*,

Appellees/Cross-appellants,

v.

STATE OF KANSAS, *et al.*,

Appellants/Cross-appellees.

SUPPLEMENTAL OPINION

Appeal from Shawnee district court; TERRY L. BULLOCK, judge. Supplemental opinion filed June 3, 2005. 2005 House Bill 2247 is not in compliance with the January 3, 2005, opinion of this court and fails to remedy the constitutional infirmities in the Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq.*, identified in that opinion.

Kenneth L. Weltz, of Lathrop & Gage L.C., of Overland Park, argued the cause, and *Curtis L. Tideman, Alok Ahuja*, and *Jeffrey R. King*, of the same firm, and *David W. Davies*, assistant attorney general, and *Phill Kline*, attorney general, were with him on the briefs for appellant/cross-appellee State of Kansas.

Dan Biles, of Gates, Biles, Shields & Ryan, P.A., of Overland Park, argued the cause, and *Rodney J. Bieker*, of Kansas Department of Education, and *Cheryl Lynn Whelan*, of Lawrence, were with him on the briefs for appellants/cross-appellees Janet Waugh, Sue Gamble, John Bacon, Bill Wagnon, Connie Morris, Kathy Martin, Kenneth Willard, Carol Rupe, Iris Van Meter, Steve Abrams, and Andy Tompkins.

Alan L. Rupe, of Kutak Rock LLP, of Wichita, argued the cause, and *Richard A. Olmstead*, of the same firm, and *John S. Robb*, of Somers Robb & Robb, of Newton, were with him on the briefs for appellees/cross-appellants.

Wm. Scott Hesse, assistant attorney general, was on the brief for defendants/cross-appellees Governor Kathleen Sebelius and State Treasurer Lynn Jenkins.

Jane L. Williams, of Seigfreid, Bingham, Levy, Selzer & Gee, of Kansas City, Missouri, was on the briefs for *amicus curiae* Kansas Families United for Public Education.

Patricia E. Baker and *Zachary J.C. Anshutz*, of Kansas Association of School Boards, of Topeka, were on the briefs for *amicus curiae* Kansas Association of School Boards.

David M. Schauner and *Robert M. Blaufuss*, of Kansas National Education Association, of Topeka, were on the briefs for *amicus curiae* Kansas National Education Association.

Joseph W. Zima, of Topeka Public Schools, was on the brief for *amicus curiae* Unified School District No. 501, Shawnee County, Kansas.

Michael G. Norris and *Melissa D. Hillman*, of Norris, Keplinger & Hillman, L.L.C., of Overland Park, were on the brief for *amici curiae* Unified School Districts Nos. 233, 229, and 232, Johnson County, Kansas.

Anne M. Kindling, of Goodell, Stratton, Edmonds & Palmer, L.L.P., of Topeka, was on the briefs for *amicus curiae* Unified School District No. 512, Shawnee Mission, Kansas.

Bernard T. Giefer, of Giefer Law LLC, of WaKeeney, was on the briefs for *amici curiae* Unified School District No. 208, Trego County, Kansas (WaKeeney), *et al.* (60 other Kansas school districts).

Thomas R. Powell and *Roger M. Theis*, of Hinkle Elkouri Law Firm L.L.C., of Wichita, were on the briefs for *amicus curiae* Unified School District No. 259, Sedgwick County, Kansas.

Janice L. Mathis, of Rainbow/PUSH Coalition, of Atlanta, Georgia, was on the brief for *amicus curiae* Rainbow/PUSH Coalition.

Cynthia J. Sheppeard, of Weathers & Riley, of Topeka, was on the briefs for *amicus curiae* Kansas Action for Children.

Bob L. Corkins, of Lawrence, was on the brief for *amicus curiae* Kansas Taxpayers Network.

Kirk W. Lowry, of Kansas Advocacy & Protective Services, of Topeka, was on the brief for *amicus curiae* Kansas Advocacy & Protective Services.

Martha B. Crow, of Crow, Clothier & Associates, of Leavenworth, was on the brief for *amicus curiae* Martha B. Crow. *Dr. Walt Chappell*, of Wichita, was on the brief for *amicus curiae* Educational Management Consultants.

Tristan L. Duncan and *Daniel D. Crabtree*, of Stinson Morrison Hecker L.L.P., of Overland Park, were on the brief for *amici curiae* Individual Students in the Shawnee Mission Unified School District No. 512.

Per Curiam: This case requires us to review recent school finance legislation to determine whether it complies with our January 3, 2005, opinion and brings the state's school

financing formula into compliance with Article 6, § 6 of the Kansas Constitution. We hold that it does not.

FACTS

In our January opinion, this court reversed the district court in part and affirmed in part, agreeing that the legislature had failed to make suitable provision for finance of the public school system and, thus, had failed to meet the burden imposed by Article 6, § 6 of the Kansas Constitution. *Montoy v. State*, 278 Kan. 769, 102 P.3d 1160 (2005) (*Montoy II*). Among other things, we held that the Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq.*, as funded, failed to provide suitable finance for students in middle-sized and large districts with a high proportion of minority and/or at-risk and special education students; some school districts were being forced to use local option budgets (LOB) to finance a constitutionally adequate education, *i.e.*, suitable education; the SDFQPA was not based upon actual costs, but rather on former spending levels and political compromise; and the failure to perform any cost analysis distorted the low-enrollment, special education, vocational education, bilingual, and at-risk student weighting factors.

We further held that among the critical factors for the legislature to consider in achieving a suitable formula for financing education were "equity with which the funds are distributed and the actual costs of education, including appropriate levels of administrative costs." We provided this guidance because "the present financing formula increases disparities in funding, not based on a cost analysis, but rather on political and other factors not

relevant to education." We also held that "increased funding will be required." *Montoy II*, 278 Kan. at 775.

We stayed the issuance of the mandate to allow the legislature a reasonable time to correct the constitutional infirmity in the then existing financing formula. Rather than suspend the funding of education, we ordered that the present financing formula and funding would remain in effect until the court took further action, noting: "The legislature, by its action or lack thereof in the 2005 session, will dictate what form our final remedy, if necessary, will take." We set a deadline of April 12, 2005. *Montoy II*, 278 Kan. at 776.

The legislature timely responded by enacting 2005 House Bill 2247 on March 30, 2005, which was modified by 2005 Senate Bill 43, passed during the veto session (collectively H.B. 2247). The Governor allowed the bill to become law without her signature, and the new legislation was delivered to this court.

On April 15, 2005, we issued an order which, among other things, directed the parties to file briefs addressing "whether the financing formula, as amended by H.B. 2247, meets the legislature's constitutional burden to 'make suitable provision for finance' of the public schools."

The parties were first directed to address 10 specific components of the financing formula. With respect to each of the components, as well as to the formula as a whole, the parties were asked to address our special concern as to whether the actual costs of providing a suitable education was considered and whether H.B. 2247 exacerbates and/or creates funding disparities among the districts.

Second, the parties were asked to address whether additional fact-finding would be necessary, and, if so, how that fact-finding should be pursued.

Third, the parties were asked to address what remedial action should be ordered and on what timetable in the event the court concludes, without additional fact-finding, that the financing formula, as amended by H.B. 2247, is still unconstitutional.

The parties were ordered to appear before this court on May 11, 2005, to show cause why the court should or should not find that H.B. 2247 complied with our January opinion. We recognized that the burden of proof had been on the plaintiffs to show that the SDFQPA, as it existed at the time of the filing of the action herein, was constitutionally infirm. We held that because the plaintiffs had prevailed, the burden of proof had "shifted to the defendants to show that the legislature's action has resulted in suitable provision for the financing of education as required by Article 6, § 6."

Pursuant to our April order, the defendants, State of Kansas (State) and the Board of Education members and Commissioner of Education (Board), filed separate briefs. The plaintiffs filed a response brief. Ten *amici curiae* briefs were filed. Oral arguments were heard by this court on May 11, 2005.

We must now decide if H.B. 2247 remedies the SDFQPA infirmities identified in our January opinion and thus makes suitable provision for financing of education as mandated by Article 6, § 6 of the Kansas Constitution. To do that, we first need to identify the changes H.B. 2247 makes in the SDFQPA.

H.B. 2247 modifies the school finance system in several ways. First, it alters the Base State Aid Per Pupil (B SAPP) and several of the weightings and other factors that affect the formula. It increases bilingual and at-risk weightings; it eliminates correlation weighting; it provides for phased-in increases in funding of special education excess costs at a statutorily prescribed level; and it provides for increases in general state aid based on the Consumer Price Index-Urban (CIP-U). It does not substantively change the low-enrollment weighting provision as it existed at the time of the January opinion.

Second, it provides certain districts the authority to raise additional revenue through local ad valorem taxes upon taxable tangible property within the district. Specifically, it provides a phased-in increase in the LOB cap. Before H.B. 2247 was enacted, a school district could enact a LOB that was as much as 25 percent of its state financial aid. K.S.A. 72-6433(a)(1)(A)-(D); K.S.A. 72-6444. H.B. 2247 makes incremental increases in this cap of 27 percent in the 2005-06 school year, 29 percent in 2006-07, and 30 percent in 2007-08. H.B. 2247 also authorizes districts with high housing costs to levy additional ad valorem taxes upon the taxable tangible property within the district. The rationale for this provision is to allow districts to pay enhanced teacher salaries. In addition, districts with extraordinary declining enrollment may apply to the Board of Tax Appeals (BOTA) for permission to levy an ad valorem tax on the taxable tangible property of the district in an amount authorized by BOTA.

Third, H.B. 2247 makes several nonformula changes. It provides for statutorily mandated areas of instruction; establishes an 11-member "2010 Commission" to provide legislative oversight of the school finance system; and

provides for a study by the Legislative Division of Post Audit to "determine the costs of delivering the kindergarten and grades one through 12 curriculum, related services and other programs mandated by state statute in accredited schools."

Fourth, H.B. 2247 limits all new local capital outlay mill levies to eight mills. SDFQPA originally capped the capital outlay level at four mills, but the cap was completely removed in 1999.

Fifth, certain changes to H.B. 2247 made by S.B. 43 are slated to become effective July 1, 2005, while other provisions became law upon publication in the Kansas Register. See S.B. 43, secs. 27, 28.

The estimated grand total for H.B. 2247's fiscal impact is approximately $142^{(1)}$ million in additional state funding for the 2005-06 school year.

DISCUSSION AND ANALYSIS

Overall, the State claims that the constitutionality of the school financing formula as amended by H.B. 2247 is not properly before this court. In its view, this case can address only the *former* financing formula, which no longer exists. Regarding the important issue of consideration of actual costs, the State contends that the legislature did consider such costs to the extent possible. At oral arguments, the State repeatedly claimed that our focus should be limited to whether the legislature had authority to pass school finance legislation, suggesting any further intervention by this court would offend the separation of powers doctrine and the carefully calibrated system of checks and balances among our three branches of government.

In the alternative, the State generally argues that if the financing formula's constitutionality remains at issue, H.B. 2247 should enjoy a presumption of constitutionality and the burden of proof should be upon the plaintiffs to demonstrate otherwise. Moreover, if the court should determine that further fact-finding is necessary on the constitutional issue, the case should be remanded for further proceedings, with the present legislation remaining in effect until the remand produces another district court ruling. Finally, as another alternative, the State argues that if this court holds the legislation unconstitutional, without remand, then our only authority is to strike it in toto. In that event, the State contends, the legislature would have to enact new legislation, because this court has no authority to impose an interim funding plan.

In contrast, the Board argues that the issue before us is whether the State complied with our January opinion. It generally disagrees that the legislation fully meets the legislature's constitutional obligation. It also argues that H.B. 2247's modifications to the financing formula were not based upon the actual costs of providing a suitable education. However, because the legislation commissions a cost study, the Board asserts this court should uphold the legislation as an adequate interim first step in a multi-year remedial response. It urges us to hold that the changes made by H.B. 2247 are sufficient pending the results of the cost study, *i.e.*, an installment on the first remedy year toward what may very well be a much larger obligation based on the evidence in this case.

The Board strongly disagrees, however, with the legislation's provisions allowing increased funding authority based solely on local ad valorem property taxes, because it believes these provisions exacerbate funding inequities

based on district wealth. It asks that these provisions be stricken, with the remainder of H.B. 2247 taking effect to enable school districts to plan for the rapidly approaching school year with the benefit of increased state aid. The Board also specifically disagrees with the parameters of the legislature's proposed cost study and expresses concerns that merely studying how much money has been spent over the years on a broken school financing system will be of little assistance. As a result, it argues that additional fact-finding will be necessary to determine the future costs of providing a suitable education.

The plaintiffs argue the increases in funding "fall grossly short of what is actually necessary to provide a constitutionally suitable education." They agree with the Board that actual costs were not considered and allege that the legislation was the result of political compromise and what the majority of the legislature believed it could provide without raising taxes. They also agree with the Board that the three provisions dependent on local ad valorem property taxes compound the formula's unjustified funding disparities.

The plaintiffs further argue that additional fact-finding is unnecessary. They ask us to (1) declare the legislation unconstitutional; (2) direct the Board to design a temporary school funding plan that incorporates recommendations from the 2001 Augenblick & Myers Study (A&M study), and direct the State to implement the plan, on a temporary basis, by July 1, 2005; (3) direct the State to enact constitutional legislation for funding public education; and (4) retain jurisdiction to ensure our orders are followed.

With this overview of the parties' arguments in mind, we turn to consideration of more specific contentions.

In support of its argument that the financing formula, as amended by H.B. 2247, is no longer properly before us, the State relies on *Knowles v. State Board of Education*, 219 Kan. 271, 547 P.2d 699 (1976). It characterizes *Knowles* as "indistinguishable" from the situation before us. In fact, the State's reliance on *Knowles* is misplaced because *Knowles* was before this court in an entirely different procedural posture.

In *Knowles*, the district court struck down the 1973 School District Equalization Act as unconstitutional. Because the legislature was in session when the judgment was entered, the district court withheld issuing a remedy in order to give the legislature time to correct "the inequities." The legislature amended the 1973 School District Equalization Act effective July 1, 1975. The district court took judicial notice of the new bill, declined to hear new evidence, dissolved the injunction, and dismissed the case. The district court held that because the legislature enacted new legislation, the law as it existed on the date of the decision no longer was in effect. Thus any determination concerning the constitutionality of the old law was moot, and any issue of the constitutionality of the new legislation was an entirely new matter that must be litigated in a new action. *Knowles*, 219 Kan. at 274.

The *Knowles* plaintiffs appealed the order dissolving the injunction and dismissing the case. This court found the new legislation had not rendered the case moot and reversed and remanded the matter to the district court for additional fact-finding on the changes made to the formula. This court rejected the plaintiffs' request that it rule

on the constitutionality of the new legislation, stating that the facts and figures necessary to demonstrate plaintiffs' claims as to the new legislation were not part of the record before the court. *Knowles*, 219 Kan. at 278.

In *Knowles*, this court did not review the 1973 Act in the first instance; nor did it reach an independent conclusion as to the constitutionality of that Act. In contrast, in the instant case, not only was the issue of the constitutionality of the SDFQPA before this court pursuant to our appellate jurisdiction, but also we evaluated the district court's findings of fact to determine if they were supported by substantial competent evidence and determined the school financing formula was unconstitutional. In addition, the statutory amendments at issue in *Knowles* were made in response to the district court's declaratory judgment issued while it still had jurisdiction over the case. Here, H.B. 2247 arose as a remedy in response to a specific order of this court while we retained jurisdiction. Due to these differences, the following statement in *Knowles* actually supports our continuing review at this juncture:

"The right of persons to challenge the constitutional effect of a law upon their persons or property should not be aborted every time the law is amended by the legislature. In some instances amendments occur almost annually with minimal impact upon the overall effect of the law. It is entirely possible that the 1976 legislature will again amend this Act.

. . . .

"The nature of this controversy is such that the rights of the parties continue to be affected by the law. It is an ongoing controversy which can be adjudicated in the

present action as well, if not better, than in a new action filed." *Knowles*, 219 Kan. at 279-80.

In short, this court's retained jurisdiction allows a review to determine if there has been compliance with our opinion.

The State's next argument – that if the provisions of H.B. 2247 are properly before us, we must presume that the new statute is constitutional – has already been rejected. (Order, 4/15/05.) While this presumption normally applies to initial review of statutes, in this case we have already determined the financing formula does not comply with Article 6, § 6. H.B. 2247 was passed because this court ordered remedial action. The State now presents its remedy for our determination of whether it complies with our order.

The Ohio Supreme Court faced the same argument after the Ohio Legislature passed school finance legislation in response to the court's ruling that the system was unconstitutional. It also rejected the argument, stating:

"The legislature has the power to draft legislation, and the court has the power to determine whether that legislation complies with the Constitution. *However, while it is for the General Assembly to legislate a remedy, courts do possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional.* If it did not, then the power to find a particular Act unconstitutional would be a nullity. As a result there would be no enforceable remedy. A remedy that is never enforced is truly not a remedy." (Emphasis added.) *DeRolph v. State*, 89 Ohio St. 3d 1, 12, 728 N.E.2d 993 (2000).

Typically a party asserting compliance with a court decision ordering remedial action bears the burden of establishing that compliance, and our April 15 order made the allocation of that burden clear in this case. See also *DeRolph v. State*, 83 Ohio St. 3d 1212, 1212, 699 N.E.2d 518 (1998) (state must meet burden by preponderance of evidence standard).

We also reject the State's related argument that the doctrine of separation of powers limits our review to the issue of whether the legislature had the authority to pass such legislation. Any language in *U.S.D. No. 229 v. State*, 256 Kan. 232, 236-38, 885 P.2d 1170 (1994), to this effect is inapplicable here because of this case's remedial posture. Even now, however, we do not quarrel with the legislature's authority. We simply recognize that the final decision as to the constitutionality of legislation rests exclusively with the courts. Although the balance of power may be delicate, ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), it has been settled that the judiciary's sworn duty includes judicial review of legislation for constitutional infirmity. We are not at liberty to abdicate our own constitutional duty.

Again, like arguments have been raised in other state courts. Other state courts consistently reaffirm their authority, indeed their duty, to engage in judicial review and, when necessary, compel the legislative and executive branches to conform their actions to that which the constitution requires.

For example, in *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 54-55, 91 S.W.3d 472 (2002), the court reviewed legislation passed after its 1994 determination that

the Arkansas school financing system violated the education provisions of that state's constitution. The Arkansas Supreme Court stated:

"This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education. As Justice Hugo Black once sagely advised: *'[T]he judiciary was made independent because it has . . . the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and legislative branches.'* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U.L. Rev. 865, 870 (1960).

. . . .

"The Supreme Court of Kentucky has emphasized the need for judicial review in school-funding matters. The language of that court summarizes our position on the matter, both eloquently and forcefully, and, we adopt it:

'Before proceeding . . . to a definition of "efficient" we must address a point made by the appellants with respect to our authority to enter this fray and to "stick our judicial noses" into what is argued to be strictly the General Assembly's business.

' . . . [In this case] we are asked – based solely on the evidence in the record before us – if the present system of common schools in Kentucky is "efficient" in the constitutional sense. *It is our sworn duty to decide such questions when they are before us by applying the constitution. The duty of the judiciary in Kentucky was so determined when the citizens of Kentucky enacted the social compact called*

the constitution and in it provided for the existence of a third equal branch of government, the judiciary.

' . . . To avoid deciding the case because of "legislative discretion," "legislative function," etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.

'The judiciary has the ultimate power, and the duty, to apply, interpret, define, and construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is *solely* the function of the judiciary to so do. This duty must be exercised even when such action services as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public.' " (Emphasis added.)

Almost 60 years ago the Kansas Supreme Court addressed the separation of powers issue in the non-school finance case of *Berentz v. Comm'rs of Coffeyville*, 159 Kan. 58, 152 P.2d 53 (1944). There the appellants challenged a pension act on the grounds it violated Article 2, § 17 of the Kansas Constitution. Finding the challenge meritorious, this court noted:

"[T]his court has always approached consideration of questions challenging the constitutionality of statutes with a disposition to determine them in such manner as to sustain the validity of the enactment in question. It has repeatedly recognized, as we do now, the rule that *it is the duty of the court to uphold a law whenever such action is possible. In so doing it has not, however, lost sight of the fact that constitutions are the work not of legislatures or of*

courts, but of the people, and when in its calm and deliberate judgment, free from the influences frequently responsible for legislative enactments, it determines rights guaranteed by its provisions have been encroached upon it has, with equal consistency, recognized its duty and obligation to declare those enactments in contravention of constitutional provisions." (Emphasis added.) 159 Kan. at 62-63.

Our holding in *Berentz* is consistent with decisions in other states when a challenge has been made to the constitutionality of school finance systems and a separation of powers issue has arisen during the remedial phase. We agree with the conclusions drawn by one commentator reviewing those cases:

"[J]udicial monitoring in the remedial phase can help check political process defects and ensure that meaningful relief effectuates the court's decision.

"*Thus, when these defects lead to a continued constitutional violation, judicial action is entirely consistent with separation of powers principles and the judicial role. Although state constitutions may commit educational matters to the legislative and executive branches, if these branches fail to fulfill such duties in a constitutional manner, 'the Court too must accept its continuing constitutional responsibility . . . for overview . . . of compliance with the constitutional imperative.'* Moreover, unlike federal courts, state courts need not be constrained by federalism issues of comity or state sovereignty when exercising remedial power over a state legislature, for state courts operate within the system of a single sovereign.

"Nor should doubts about the court's equitable power to spur legislative action or to reject deficient legislation impede judicious over-sight. An active judicial role in

monitoring remedy formulation is well-rooted in the courts' equitable powers. As long as such power is exercised only after legislative noncompliance, it is entirely appropriate." (Emphasis added.) Note, *"Unfulfilled Promise: School Finance Remedies and State Courts,"* 104 Harv. L. Rev. 1072, 1087-88 (1991).

We now turn to this court's specific concerns about whether the actual costs of providing a constitutionally adequate education were considered as to each of the formula components and the statutory formula as a whole, and whether any unjustified funding disparities have been exacerbated rather than ameliorated by H.B. 2247. In this determination we will be guided, in large part, by the A&M study, despite the State's criticism of it and our knowledge that, at best, its conclusions are dated. We do so for several reasons.

First, the A&M study is competent evidence admitted at trial and is part of the record in this appeal. See *Montoy II*, 278 Kan. at 774 (within the extensive record on appeal "there is substantial competent evidence, including the Augenblick & Myers study, establishing that a suitable education, as that term is defined by the legislature, is not being provided").

Second, the legislature itself commissioned the study to determine the actual costs to suitably and equitably fund public school systems; it also maintained the overall authority to shape the contours of the study and to correct any A&M actions that deviated from its directions during the process. (See K.S.A. 60-460[h]). As we stated in *Montoy II*:

"[T]he legislature directed that a professional evaluation be performed to determine the costs of a suitable education for Kansas school children. In authorizing the study,

the legislature defined 'suitable education.' K.S.A. 2003 Supp. 46-1225(e). The Legislative Education Planning Committee (LEPC), to whom the task of overseeing the study was delegated, determined which performance measures would be utilized in determining if Kansas' school children were receiving a suitable education. The evaluation, performed by Augenblick & Myers, utilized the criteria established by the LEPC, and, in part, examined whether the current financing formula and funding levels were adequate for schools to meet accreditation standards and performance criteria. The study concluded that both the formula and funding levels were inadequate to provide what the legislature had defined as a suitable education." *Montoy II*, 278 Kan. at 773-74.

Third, the A&M study is the only analysis resembling a cost study before this court or the legislature.

Fourth, both the Board and the State Department of Education recommended that the A&M study recommendations be adopted at the time the study was completed and sent to the legislature.

With the A&M study as background, we next examine the provisions of H.B. 2247 in light of the two guiding considerations set forth in our January opinion: (1) actual costs of providing a constitutionally adequate education and (2) funding equity.

BASE STATE AID PER PUPIL

BSAPP is the foundation upon which school district funding is built, as state financial aid to schools is determined by multiplying BSAPP by each district's "weighted enrollment." See K.S.A. 72-6410(b). When the SDFQPA

was first implemented in 1992, BSAPP was set at $3,600. It remained at that level until 1995, when it was increased by $26 to $3,626. Small increases were funded each year thereafter until the 2002-03 school year. During the years of increases, the amounts ranged from an additional $22 to $50 per student. From 2002 until 2005, the statute allowed for a BSAPP of $3,890; however, only $3,863 was funded. Over the span of time from when the SDFQPA was implemented in 1992 until 2005, the legislature increased the BSAPP only a total of $263. As the plaintiffs point out, if the BSAPP had been increased to keep up with inflation, in 2001 alone the increase would have been $557. The A&M study recommended increasing the base to $4,650 in 2001, resulting in $623.3 million in additional funding (in 2001 dollars).

H.B. 2247 increases the BSAPP from $3,890 to $4,222. Only $115 of the $359 increase is "new" money; the balance was achieved by eliminating the correlation weighting and shifting those dollars to BSAPP. The $115 increase translates to $63.3 million in additional funding flowing into the financing formula for the 2005-06 school year.

The State argues the legislature considered actual costs in deciding upon the increase.

The plaintiffs point out that the legislature had the A&M study recommendations, as well as the results of a 2005 survey conducted by Deputy Commissioner of Education Dale Dennis for the Senate Education Committee. The survey, which requested cost information from selected school districts, showed the BSAPP should be $6,057. The plaintiffs argue that the legislature ignored the A&M and Dennis figures, instead looking at historical expenditures and arbitrarily choosing a BSAPP level based on political

compromises and what it believed it could afford without raising taxes.

The Board contends that the increase in the BSAPP, coupled with increases in the at-risk and bilingual weightings, provide a substantial increase in funding for those middle-sized and large districts with a high proportion of such students. By implication, this is an argument that the BSAPP increase helps equalize the finding disparity suffered by those districts.

The plaintiffs, on the other hand, claim that increasing the BSAPP only exacerbates the inequities in the system because the formula was not adjusted to make distorted weights, such as the low-enrollment weight, correspond to actual costs. For example, for every $1 of base funding that middle-sized or large districts receive, some low-enrollment districts receive $2.14. The plaintiffs assert Dr. Bruce Baker's testimony at trial and his earlier report described this effect.

At a minimum, the increased BSAPP provided for in H.B. 2247 substantially varies from any cost information in the record and from any recommendation of the Board or the State Department of Education.

AT-RISK

H.B. 2247 increases funding for at-risk students from .10 of the BSAPP to .145. This increased weighting, when applied to the higher BSAPP, results in an increase of $26 million targeted to at-risk students. The A&M study recommended a weight of .20 for districts with 200 or fewer students, .52 for districts with 1,000 students, .59 for districts with 10,000 students, and .60 for districts

with 30,000 students, resulting in a range of $1,491 to $2,790 per student (in 2001 dollars).

Both the State and the Board contend the increased funding for at-risk students is significant. The Board argues that, pending performance of a new cost study, H.B. 2247 should be viewed as a good faith effort toward legislative compliance with our January 3, 2005, opinion. The plaintiffs, on the other hand, contend that the increased funding level remains significantly lower than that recommended by the State's own expert witness in 1991, *before* the SDFQPA was enacted. That expert, Dr. Allan Odden, recommended a .25 minimum weight to provide an extra $1,000 for each eligible at-risk student.

Neither the State nor the Board contend that actual costs of educating at-risk students were considered.

BILINGUAL

H.B. 2247 increases the weighting for bilingual programs from .2 to .395 for the 2005-06 school year and thereafter. When applied to the higher BSAPP, the result is an $11 million increase in state aid. The Board computes the effects of these changes to be an additional $1,668 per bilingual student, a 115.7 percent increase. A&M recommended that the bilingual weighting increase be based on student enrollment and that it range from .15 to .97, providing $1,118 to $4,510 per bilingual student.

The plaintiffs point out that this weighting is limited to "contact hours," usually a maximum of two hours per day for each student. This means the $1,668 amount must be reduced by 2/3, to $556 per actual bilingual student.

The State contends that it considered the actual costs of providing a suitable education for bilingual students. That contention is based solely on the House Select Committee on School Financing's reliance on historical data showing what school districts had already been spending under the financing formula we have held to be unconstitutional. The Board makes no argument as to the weighting's relationship to actual costs; it simply repeats that it regards the change in the weighting as a good faith effort toward compliance.

Although the increase in this weighting is significant, it still differs substantially from the cost information in the record.

SPECIAL EDUCATION

H.B. 2247 provides for a multi-year phased-in increase in state reimbursement for special education excess costs from 85 percent in the 2005-06 school year to 88 percent in 2006-07 and 91 percent in 2007-08 and thereafter. According to the evidence at trial, the State had been funding only 85 percent of the excess costs of special education. For fiscal year 2005, however, only 81.7 percent of the average excess costs of special education were funded. Reimbursement at 85 percent thus results in a total finding increase of $17.7 million for the upcoming school year.

The plaintiffs contend that anything less than 100 percent reimbursement for a district's special education costs is a failure to fund the actual costs of a suitable education. The State and the Board both disagree, contending less than 100 percent reimbursement furthers the State's policy of discouraging school districts from over-identifying students as eligible for special education money.

The defendants have failed to point to any evidence that any district has ever over-identified students; and, when asked at oral arguments, the State's counsel responded that he was not aware of any district that had intentionally inflated its number of such students to maximize reimbursement. Furthermore, the A&M study recommended a range, based on student enrollment, of weights from .90 to 1.50, resulting in a nearly $102.9 million (in 2001 dollars) increase in finding – a stark contrast to the $17.7 million provided by H.B. 2247.

LOCAL OPTION BUDGET

H.B. 2247 provides a phased-in increase in the LOB cap from the current 25 percent to 27 percent in the 2005-06 school year, 29 percent in the 2006-07 school year, and 30 percent in the 2007-08 school year and thereafter.

The plaintiffs argue local districts have been forced to use the LOB to cover the inadequacies of state funding. They also argue the use of the LOB increases disparities and exacerbates inequities.

The Board takes issue with the legislature's failure to provide for equalization for the new level of LOB authority above 25 percent for the 2005-06 school year only. The absence of equalization means the dollars for the optional increases must come entirely from each district's property tax base, which can worsen wealth-based disparities.

The State argues that the LOB acts as a counterweight to low-enrollment weighting, at-risk weighting, and perhaps even bilingual weighting, because the middle-sized and large districts expected to benefit from the increased LOB "receive little, if any, of these weightings."

This argument fails because increasing the LOB does not address inadequate funding of middle-sized and large districts that have high concentrations of bilingual, at-risk, minority, and special education students, high pupil-to-teacher ratios, and high dropout rates, but also have low median family incomes and low assessed property valuation. For example, the Emporia school district demonstrates that size of enrollment does not necessarily correlate with high property valuations or low numbers of students who are more costly to educate.

The original intent and purpose of the LOB was to allow individual districts to levy additional property taxes to fund enhancements to the constitutionally adequate education provided and financed under the legislative financing formula. The evidence before the trial court demonstrated that the inadequacy of the formula and its funding had forced some districts to use the LOB to fund the State's obligation to provide a constitutionally adequate education rather than enhancements. See *Montoy II*, 278 Kan. at 774. H.B. 2247 does nothing to discourage this practice.

We also agree with the plaintiffs and the Board that, in fact, the legislation's increase in the LOB cap exacerbates the wealth-based disparities between districts. Districts with high assessed property values can reach the maximum LOB revenues of the "district prescribed percentage of the amount of state financial aid determined for the district in the school year" (K.S.A. 72-6433[a][1], amended by S.B. 43, sec. 17) with far less tax effort than those districts with lower assessed property values and lower median family incomes. Thus, the wealthier districts will be able to generate more funds for elements of a constitutionally adequate education that the State has failed to fund.

COST-OF-LIVING WEIGHTING

H.B. 2247 authorizes a new local property tax levy for cost-of-living weighting. As originally enacted, the purpose of this weighting was to "finance teacher salary enhancements." H.B. 2247, sec. 19. In S.B. 43, sec. 12, the legislature removed this limiting provision and no purpose for the additional funding is now stated in the law. This weighting is available in those districts where the average appraised value of a single-family residence exceeds 125 percent of the state average, as long as the district has already adopted the maximum LOB. This is estimated to amount to a total funding increase of $24.6 million for the 17 districts that would currently qualify.

This provision, the State asserts, is necessary to allow districts with high housing costs to recruit and retain high-quality teachers and is based on the actual costs of providing an education in those 17 districts that would qualify.

Counsel for the State could not substantiate, when asked at oral arguments, its rationale that those 17 districts pay higher salaries or would pay higher salaries to teachers or that higher education costs are linked to housing prices. Further, as the plaintiffs noted, the evidence at trial demonstrated that it is the districts with high-poverty, high at-risk student populations that need additional help in attracting and retaining good teachers.

Furthermore, we note that this weighting, like the increase in the LOB cap, demonstrates the State is not meeting its obligation to provide suitable financing. Also, as with the other property-tax based provisions of H.B. 2247 there is a potentially disequalizing effect. Moreover, since the original reason given for the enhancement,

teacher salary increases, has been removed from the legislation, the funds generated can be used for any purpose.

LOW-ENROLLMENT WEIGHTING

Low-enrollment weighting provides a sliding scale of adjustments for districts with fewer than 1,750 students; as district enrollment decreases past that number, the size of the adjustment increases. In other words, smaller school districts receive more favorable treatment based on the premise that they require additional funding to balance economies of scale at work for larger districts.

H.B. 2247 did not substantively change the low-enrollment weighting; it remains a significant component of the financing formula. Extrapolating from State Department of Education data, the plaintiffs argue that total state spending on the low-enrollment weighting in 2003-04 was $226,189,852. In comparison, total state spending in 2003-04 on at-risk students was $47,123,964 and on bilingual students was $8,352,964. The plaintiffs also note that application of the various weighting factors results in a large disparity in per pupil aid, ranging in 2002-03 from $16,968 to $5,655, and this disparity is largely caused by the low-enrollment factor.

Because of the significant impact of low-enrollment weighting on the financing formula, in our January opinion and April order we sought cost justifications for it. In response to questions from the court at oral arguments, counsel for the State could not provide any cost-based reason for using the 1,750 enrollment figure or for the weight's percentage. This absence of support is particularly troubling when we consider the disparity

this low-enrollment weighting may produce. H.B. 2247 has the potential to worsen this inequity because it eliminates correlation weighting for districts with 1,750 enrollment or more. The funds allocated for correlation weighting were transferred to the BSAPP; this gives low-enrollment districts even more of the funds that previously were devoted to balancing the disparities in per pupil funding caused by the low-enrollment weighting.

EXTRAORDINARY DECLINING ENROLLMENT

In addition to the declining enrollment provision of K.S.A. 2004 Supp. 72-6407(e)(2), H.B. 2247, as amended by S.B. 43, created two provisions concerning extraordinary declining enrollment. First, H.B. 2247 authorizes a district with "extraordinary declining enrollment," defined as declining enrollment over 3 years at a rate of 15 percent or 150 pupils per year, to apply to the Board of Tax Appeals (BOTA) for permission to levy an additional property tax if it has already adopted the maximum LOB. See H.B. 2247, sec. 29, repealed and replaced by S.B. 43, sec. 13. Currently only four districts potentially would qualify for this provision. We will refer to this provision as the EDE-BOTA provision.

Second, H.B. 2247 requires districts entitled to equalizing supplemental capital improvements state aid on their bonds to seek approval from the Joint Committee on State Building Construction (JCSBC) prior to issuing new bonds if the district has had an "extraordinary declining enrollment," defined for purposes of this section as declining enrollment over 3 years at a rate of 5 percent or 50 pupils per year. If approval is denied, the district can still issue the bonds, but it does not receive any state aid on the

bonds. See H.B. 2247, sec. 28, repealed and replaced by S.B. 43, sec. 14. We will refer to this provision as the EDE-JCSBC provision.

The State asserts that these provisions, which are intended to help districts absorb lost revenue from declining enrollments, ensure consideration of actual costs because districts seeking to access authority for this additional local tax levy must document need before BOTA or JCSBC.

The Board contends it is difficult to assess the financial impact of these provisions because the money available under them is potentially unlimited, subject to each district's willingness to tap into its property tax base, and, when the EDE-BOTA provision applies, BOTA's approval. The Board urges us to sever these provisions pending appropriate cost analysis.

The plaintiffs contend these provisions are not based upon cost and exacerbate funding inequities in two ways. First, the plaintiffs point to the EDE-JCSBC provision which allows issuance of bonds to construct new facilities but if permission is denied the district would not receive any state aid on the bonds. Plaintiffs contend that because wealthy districts with extraordinary declining enrollment such as Shawnee Mission receive no equalizing supplemental capital improvements state aid on their bonds, the new provision penalizes only districts with low property valuation and declining enrollment.

Second, the plaintiffs contend that these provisions exacerbate funding inequities because the extraordinary declining enrollment weight is added into the definition of a district's "adjusted enrollment" and thus adds to the base upon which the LOB is computed. The effect of this is

to provide 127 percent of any revenues lost from extraordinary declining enrollment. This effect is further compounded for those districts, like Shawnee Mission, that also benefit from the cost-of-living weight, which is also included in the "adjusted enrollment."

These provisions have the potential to be extremely disequalizing because they are unlimited and have been designed to benefit a very small number of school districts.

CAPITAL OUTLAY

In support of this provision of H.B. 2247, the State relies upon an affidavit of Representative Mike O'Neal. The affidavit states the legislature was mindful that this court had noted the repeal of the capital outlay cap in its January opinion. The affidavit also states the decision to reimpose the cap at 8 mills was made after the legislature reviewed data from the Department of Education and heard from various districts. The Board does not offer any information as to whether actual costs were considered with respect to this provision.

The plaintiffs do not specifically address the extent to which actual costs were considered in imposing the new cap on capital outlay. The plaintiffs argue that, although H.B. 2247 reimposes a cap on the capital outlay authority, it still is disequalizing because it grandfathers those districts with a higher capital outlay resolution in place for up to 4 more years.

The State argues, without elaboration, that the 8 mill cap reflects the legislature's attempt to improve wealth equalization. The Board encourages the court to view this

change favorably, despite the local property tax basis of this factor.

Because the provision is based on local property tax authority, the amount of revenue a district can raise is tied to property value and median family income; thus the failure to provide any equalization to those districts unable to access this funding perpetuates the inequities produced by this component.

FINANCING FORMULA AS A WHOLE

With regard to the financing formula as a whole, the parties basically restate the same arguments they made regarding the formula's components. The State claims that the increased funding provided by H.B. 2247 alleviates this court's constitutional concerns. The Board disagrees, but it considers the increased funding a good faith initial effort toward compliance and an installment on the first remedy year toward what may very well be a much larger obligation based on the evidence in this case. The plaintiffs argue the increases in funding "fall grossly short of what is actually necessary to provide a constitutionally suitable education." The State contends that overall it considered, to the extent possible, actual costs, including the A&M study. The plaintiffs respond that actual costs were not considered; rather the financing formula as amended by H.B. 2247 is merely a product of political compromise and the legislative majority's unwillingness to consider raising taxes to increase funding of schools. The Board argues H.B. 2247 does not fund actual costs and has many inequities.

We agree with the Board that although H.B. 2247 does provide a significant funding increase, it falls short of

providing constitutionally adequate funding for public education. It is clear that the legislature did not consider what it costs to provide a constitutionally adequate education, nor the inequities created and worsened by H.B. 2247. At oral arguments, counsel for the State could not identify any cost basis or study to support the amount of funding provided by H.B. 2247, its constellation of weightings and other provisions, or their relationships to one another.

Particularly, we share the plaintiffs' and Board's concern that H.B. 2247's increased dependence on local property taxes, as decided by each school district, exacerbates disparities based on district wealth. We fully acknowledge that once the legislature has provided suitable funding for the state school system, there may be nothing in the constitution that prevents the legislature from allowing school districts to raise additional funds for enhancements to the constitutionally adequate education already provided. At least to the extent that funding remains constitutionally equalized, local assessments for this purpose may be permissible. Clearly, however, such assessments are not acceptable as a substitute for the state funding the legislature is obligated to provide under Article 6, § 6. That should pre-exist the local tax initiatives.

As of this time, the legislature has failed to provide suitable funding for a constitutionally adequate education. School districts have been forced to use the LOB to supplement the State's funding as they struggle to suitably finance a constitutionally adequate education, a burden which the constitution places on the State, not on local districts. The result is wealth-based disparity because the districts with lower property valuations and median incomes are unable to generate sufficient revenue.

Because property values vary widely, a district's ability to raise money by the required mill levy also varies widely. The cost-of-living weighting and extraordinary declining enrollment provision also have the potential to exacerbate inequity. A higher LOB cap, cost-of-living weighting, and the extraordinary declining enrollment provisions cannot be allowed to exacerbate inequities while we wait for the legislature to perform its constitutional duty.

We conclude that, on the record before us, a continuing lack of constitutionally adequate funding together with the inequity-producing local property tax measures mean the school financing formula, as altered by H.B. 2247, still falls short of the standard set by Article 6, § 6 of the Kansas Constitution.

COST STUDY

As we prepare to consider an appropriate remedy and the mechanisms necessary to assure that future school financing will meet the requirements of the constitution, we agree with all parties that a determination of the reasonable and actual costs of providing a constitutionally adequate education is critical. H.B. 2247 provides for a Legislative Post Audit "cost analysis study."

Section 3 of the legislation reads in relevant part:

"(a) In order to assist the legislature in the gathering of information which is necessary for the legislature's consideration when meeting its constitutional duties to: (1) Provide for intellectual, educational, vocational and scientific improvement in public schools established and maintained by the state; and (2) make suitable provision for the finance of educational interests of the state, the

division of post audit shall conduct a professional cost study analysis to determine the costs of delivering the kindergarten and grades one through 12 curriculum, related services and other programs mandated by state statute in accredited schools. . . .

"(b) Any study conducted pursuant to subsection (a) shall include:

(1) A determination of the services or programs required by state statute to be provided by school districts. Such review shall include high school graduation requirements, admissions requirements established by the state board of regents pursuant to K.S.A. 76-716, and amendments thereto, state scholarship requirements established by the state board of regents and courses of instruction at various grade levels required by state statute.

(2) A study of the actual costs incurred in a sample of school districts to provide reasonable estimates of the costs of providing services and programs required by state statute to be provided by school districts for regular elementary and secondary education, including instruction, administration, support staff, supplies, equipment and building costs.

(3) A study of the actual costs incurred in a sample of school districts to provide reasonable estimates of the costs of providing services and programs required by state statute to be provided by school districts for specialized education services including, but not limited to, special education and related services, bilingual education and at-risk programs.

(4) A study of the factors which may contribute to the variations in costs incurred by school districts of various

sizes and in various regions of the state when providing services or programs required by state statute to be provided by school districts. Such study shall include the administrative costs of providing such services and programs.

(5) An analysis in a sample of districts as determined by the legislative post auditor showing such things as:

(A) The percent of the estimated cost of providing services and programs required by state statute that could have been funded by the various types of state aid the districts received in the most recently completed school year, as well as the percent funded by the district's local option budget;

(B) the percent of district funding that is spent on instruction;

(C) the percent of district funding that is spent on central administration; and

(D) the percent of district funding that is spent on support services.

(6) A review of relevant studies that assess whether there is a correlation between amounts spent on education and student performance.

(7) A review to determine whether students who are counted as a basis for computing funding for specialized educational services are actually receiving those services.

(8) Any additional reviews or analyses the legislative post auditor considers relevant to the legislature's decisions regarding the cost of funding services or programs required by state statute to be provided by school districts.

. . . .

"(d) Following the completion of such cost analysis study, the legislative post auditor shall submit a detailed report thereon to the legislature on or before the first day of the 2006 legislative session. If additional time is needed to provide the most accurate information relating to any area of requested study, the legislative post auditor shall so report to the legislature, explaining the reasons for the need for additional time and providing a reasonable time frame for completion of that aspect of the study. In that event, the legislative post auditor shall submit a report on that portion of the study which has been completed before the start of the 2006 legislative session and the balance of such report shall be submitted within the time frame established by the legislative post auditor when requesting additional time." H.B. 2247, sec. 3.

The plaintiffs and the Board contend that the H.B. 2247 study is designed merely to determine the amounts of historical expenditures under the system and that the legislature will then equate those expenditures to reasonable and actual costs of a future system we should find constitutional. This characterization is not entirely correct.

Although the language of the statute is not completely clear, it can be read to require post audit, among other things, to study historical costs in a sample of districts and then extrapolate from the collected data a reasonable estimate of the future cost of providing services and programs "required by state statute." Estimating future reasonable and actual costs based on historical expenditures can be acceptable if post audit ensures that its examination of historical expenditures corrects for the

recognized inadequacy of those expenditures and ensures that a reliable method of extrapolation is adopted. Post audit must incorporate those components into its study, and its report to the legislature must demonstrate how the incorporation was accomplished.

It also appears that the study contemplated by H.B. 2247 is deficient because it will examine only what it costs for education "inputs" – the cost of delivering kindergarten through grade 12 curriculum, related services, and other programs "mandated by state statute in accredited schools." It does not appear to demand consideration of the costs of "outputs" – achievement of measurable standards of student proficiency. As the Board pointed out in its brief, nowhere in H.B. 2247 is there specific reference to K.S.A. 72-6439(a) or (c), which provided the criteria used by this court in our January 2005 opinion to evaluate whether the school financing formula provided a constitutionally adequate education. H.B. 2247 also does not mention educational standards adopted by the Board pursuant to its constitutional responsibilities under Article 6, § 2(a) or in fulfilling its statutory directives. Without consideration of outputs, any study conducted by post audit is doomed to be incomplete. Such outputs are necessary elements of a constitutionally adequate education and must be funded by the ultimate financing formula adopted by the legislature. See *Montoy II*, 278 Kan. at 773 (quoting K.S.A. 72-6439) (constitutionally suitable education is one in which "schools meet the accreditation requirements and [students are] achieving an 'improvement in performance that reflects high academic standards and is measurable.'"); see also Kan. Const., Art. 6, § 1 (legislature shall provide for intellectual, educational, vocational, and scientific *improvement).* The post audit study must incorporate the

consideration of outputs and Board statutory and regulatory standards, in addition to statutorily mandated elements of kindergarten through grade 12 education. Further, post audit's report to the legislature must demonstrate how this consideration was accomplished.

The study parameters in H.B. 2247 do provide for analysis of the percentages of sample school district spending on instruction, central administration, and support services. They also specifically provide for exploration of several components of the current financing formula. We endorse these provisions with the exception that all administrative costs, not just costs of central administration, must be analyzed. All of this information should assist post audit and, eventually, the legislature and this court in evaluating the reasonableness or appropriateness of cost estimates. Suitable finance of a constitutionally adequate education does not necessarily include every item each school district or student *wants*; its focus must be on *needs* and the appropriate costs thereof.

REMEDY

In light of the legislature's unsatisfactory response to our January opinion we are again faced with the need to order remedial action. See *Montoy II*, 278 Kan. at 775 ("The legislature, by its action or lack thereof in the 2005 session, will dictate what form our remedy, if necessary, will take."). We are guided not only by our interpretation of Article 6, § 6, but also by the present realities and common sense. Time is running out for the school districts to prepare their budgets, staff their classrooms and offices, and begin the 2005-06 school year. School districts need to know what funding will be available as soon as possible.

The legislature has known for some time that increased funding of the financing formula would be necessary. In July 2002, the Kansas Department of Education prepared a computation of the cost of implementing the recommendations in the A&M study. Calculated in 2001 dollars the total cost of the increase would have been $725,669,901 for each school year. Additionally, the Department adjusted that number because of changes in LOB funding and applied a 2 percent inflation factor for each of the school years of 2001-02, 2002-03, and 2003-04. The resulting number was an increase in costs of approximately $853 million. As noted, the A&M study was commissioned by the legislature, monitored by the legislature's committees, paid for by the legislature with tax dollars, and received by the legislature.

Although the State claims it considered the A&M study, it in fact chose to impugn its design and ignore its recommendations. It can no longer do so.

This case is extraordinary, but the imperative remains that we decide it on the record before us. The A&M study, and the testimony supporting it, appear in the record in this case. The State cites no cost study or evidence to rebut the A&M study, instead offering conclusory affidavits from legislative leaders. Thus the A&M study is the only analysis resembling a legitimate cost study before us. Accordingly, at this point in time, we accept it as a valid basis to determine the cost of a constitutionally adequate public education in kindergarten through the 12th grade. The alternative is to await yet another study, which itself may be found legislatively or judicially unacceptable, and the school children of Kansas would be forced to further await a suitable education. We note that the present litigation was filed in 1999.

The initial attractiveness of the Board's suggestion that we accept H.B. 2247 as an interim step toward a full remedy pales in light of the compelling arguments of immediate need made by the plaintiffs and *amici curiae.* They remind us that we cannot continue to ask current Kansas students to "be patient." The time for their education is now. As the North Carolina Supreme Court eloquently stated:

"The children . . . are our state's most valuable renewable resource. If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive. We note that the instant case commenced ten years ago. If in the end it yields a clearly demonstrated constitutional violation, ten classes of students as of the time of this opinion will have already passed through our state's school system without benefit of relief. We cannot similarly imperil even one more class unnecessarily." *Hoke Cty Bd. of Educ. v. State*, 358 N.C. 605, 616, 599 S.E.2d 365 (2004).

As set forth earlier in this opinion, the Legislative Division of Post Audit has been commissioned to conduct a comprehensive and extensive cost study to be presented to the 2005-06 legislature. With such additional information available, the legislature should be provided with the cost information necessary to make policy choices establishing a suitable system of financing of Kansas public schools.

We conclude, however, that additional funding must be made available for the 2005-06 school year to assist in meeting the school districts' immediate needs. We are mindful of the Board's argument that there are limits on

the amount the system can absorb efficiently and effectively at this point in the budget process. We further conclude, after careful consideration, that at least one-third of the $853 million amount reported to the Board in July of 2002 (A&M study's cost adjusted for inflation) shall be funded for the 2005-06 school year.

Specifically, no later than July 1, 2005, for the 2005-06 school year, the legislature shall implement a minimum increase of $285 million above the funding level for the 2004-05 school year, which includes the $142 million presently contemplated in H.B. 2247. In deference to the cost study analysis mandated by the legislature in H.B. 2247, the implementation beyond the 2005-06 school year will be contingent upon the results of the study directed by H.B. 2247 and this opinion.

Further, if (1) the post audit study is not completed or timely submitted for the legislature to consider and act upon it during the 2006 session, (2) the post audit study is judicially or legislatively determined not to be a valid cost study, or (3) legislation is not enacted which is based upon actual and necessary costs of providing a suitable system of finance and which equitably distributes the funding, we will consider, among other remedies, ordering that, at a minimum, the remaining two-thirds ($568 million) in increased funding based upon the A&M study be implemented for the 2006-07 school year.

Clearly, the legislature's obligation will not end there; the costs of education continue to change and constant monitoring and funding adjustments are necessary. H.B. 2247's provisions regarding establishment of the 2010 Commission and mandating annual increases based upon the Consumer Price Index may satisfy these demands, but the

legislature may seek other means to assure that Kansas school children, now and in the future, receive a constitutionally adequate education.

In addition, on the rationale previously expressed, the new funding authorized by H.B. 2247's provisions regarding the increased LOB authority over 25 percent, the cost-of-living weighting, and both extraordinary declining enrollment provisions are stayed. The remainder of H.B. 2247, as amended by the legislature in compliance with this opinion, shall remain in effect for the 2005-06 school year.

We readily acknowledge that our present remedy is far from perfect; indeed, we acknowledge that it is merely a balancing of several factors. Among those factors are:

(1) The ever-present need for Kansas school children to receive a constitutionally adequate education. *Montoy II*, 278 Kan. at 773.

(2) The role of this court as defined in the Kansas Constitution. See *Berentz v. Comm'rs of Coffeyville*, 159 Kan. 58, 152 P.2d 53 (1944).

(3) The need for the legislature to bring its school finance legislation into constitutional compliance, with acknowledgment of the unique difficulties inherent in the legislative process.

(4) The press of time caused by the rapidly approaching school year.

Accordingly, we retain jurisdiction of this appeal. If necessary, further action will be taken by this court as is deemed advisable to ensure compliance with this opinion.

1. This total increase of $142 million includes a $7.35 million increase provided by 2005 H.B. 2059, which created a second enrollment count date for students who are dependents of active military personnel. The parties do not take issue with the provisions of H.B. 2059. Our discussion of the funding and provisions in H.B. 2247 collectively refers to H.B. 2247, S.B. 43, and H.B. 2059.

END

278 Kan. 769, 102 P.3d 1160

Supreme Court of Kansas.

Ryan MONTOY, et al., Appellees/Cross-appellants,

v.

STATE of Kansas, et al., Appellants/Cross-appellees.

No. 92,032.

Jan. 3, 2005.

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Bob L. Corkins, of Lawrence, was on the brief for amicus curiae Kansas Taxpayers Network.

Kirk W. Lowry, of Kansas Advocacy & Protective Services, of Topeka, was on the brief for amicus curiae Kansas Advocacy & Protective Services.

PER CURIAM:

The defendants in this case, the State of Kansas (appellant/cross-appellee) along with Janet Waugh, Sue Gamble, John Bacon, Bill Wagnon, Connie Morris, Bruce Wyatt, Kenneth Willard, Carol Rupe, Iris Van Meter, Steve Abrams and Andy Tompkins (the State Board of Education related defendants) (appellants/cross-appellees) appeal from a decision of the district court holding that the Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq.*, is unconstitutional.

The plaintiffs in this case, U.S.D. No. 305 (Salina) and U.S.D. No. 443 (Dodge City), along with 36 individually named students in those districts, cross-appeal from the district court's determination that the legislature did not abrogate the constitutional obligations of the State Board of Education.

The constitutionality of the statutory scheme for funding the public schools in Kansas is at issue in this appeal. Because this court's resolution of this issue will

have statewide effect and require legislative action in the 2005 legislative session, we announce our decision in this brief opinion. A formal opinion will be filed at a later date.

After examining the record and giving full and complete consideration to the arguments raised in this appeal, we resolve the issue as follows:

1. We reverse the district court's holding that SDFQPA's financing formula is a violation of equal protection. Although the district court correctly determined that the rational basis test was the proper level of scrutiny, it misapplied that test. We conclude that all of the funding differentials as provided by the SDFQPA are rationally related to a legitimate legislative purpose. Thus, the SDFQPA does not violate the Equal Protection Clause of the Kansas or United States Constitutions.

We also reverse the district court's holding that the SDFQPA financing formula has an unconstitutional disparate impact on minorities and/or other classes. In order to establish an equal protection violation on this basis, one must show not only that there is a disparate impact, but also that the impact can be traced to a discriminatory purpose. *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 272, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). No discriminatory purpose was shown by the plaintiffs. Thus, the SDFQPA is not unconstitutional based solely on its "disparate impact."

3. We affirm the district court's holding that the legislature has failed to meet its burden as imposed by Art. 6, § 6 of the Kansas Constitution to "make suitable provision for finance" of the public schools.

The district court reached this conclusion after an 8-day bench trial which resulted in a record of approximately 1,400 pages of transcript and 9,600 pages of exhibits. Most of the witnesses were experts in the fields of primary and secondary education. The trial followed this court's decision in *Montoy v. State,* 275 Kan. 145, 152-53, 62 P.3d 228 (2003) (*Montoy I*), in which we held, in part, that the issue of suitability was not resolved by *U.S.D. No. 229 v. State,* 256 Kan. 232, 885 P.2d 1170 (1994), *cert. denied* 515 U.S. 1144, 115 S.Ct. 2582, 132 L.Ed.2d 832 (1995). We had held in *U.S.D. No. 229* that the SDFQPA *as originally adopted in 1992* made suitable provision for the finance of public education. *See* 256 Kan. at 254-59, 885 P.2d 1170. Later, in *Montoy I,* we noted that the issue of suitability is not stagnant but requires constant monitoring. *See* 275 Kan. at 153, 62 P.3d 228.

Following the trial, the district court made findings regarding the various statutory and societal changes which occurred after the decision in *U.S.D. No. 229* and affected school funding. Regarding societal changes, the district court found: (1) 36% of Kansas public school students now qualify for free or reduced-price lunches; (2) the number of students with limited proficiency in English has increased dramatically; (3) the number of immigrants has increased dramatically; and (4) state institutions of higher learning now use more rigorous admission standards.

Additionally, the district court found a number of statutory changes made after the decision in *U.S.D. No. 229* which affected the way the financing formula delivers funds: (1) the goals set out in K.S.A. 72-6439(a) were removed; (2) the SDFQPA's provision requiring an oversight committee to ensure fair and equitable funding was

allowed to expire; (3) the low enrollment weighting was changed; (4) correlation weighting was added; (5) at-risk pupil weighting was changed; (6) the mill levy was decreased from 35 mills to 20 mills; (7) a $20,000 exemption for residential property was added to the mill levy, also decreasing revenue; (8) a new facilities weighting was added; (9) special education funds were added to the calculation to increase the base on which the local option budget funding was calculated; (10) ancillary weighting was added; (11) the cap on capital outlay authority was removed; and (12) most special education funds were limited to reimbursement for 85 percent of the costs incurred in hiring special education teachers and paraprofessionals.

Our standard of review requires us to determine whether the district court made findings of fact which are supported by substantial competent evidence and are sufficient to support the conclusions of law. *McCain Foods USA, Inc. v. Central Processors, Inc.*, 275 Kan. 1, 12, 61 P.3d 68 (2002). We conclude that the district court's findings regarding the societal and legislative changes are supported by substantial competent evidence.

The plaintiffs argued and the district court found that the cumulative result of these changes is a financing formula which does not make suitable provision for finance of public schools, leaving them inadequately funded. Before determining whether there is substantial competent evidence to support these findings, we must examine the standard for determining whether the current version of the SDFQPA makes suitable provision for the finance of public school education. The concept of "suitable provision for finance" encompasses many aspects. First and perhaps foremost it must reflect a level of funding which meets the

constitutional requirement that "[t]he legislature shall provide for intellectual, educational, vocational and scientific *improvement* by establishing and maintaining public schools. . . ." (Emphasis added.) Kan. Const. art. 6, § 1. The Kansas Constitution thus imposes a mandate that our educational system cannot be static or regressive but must be one which "advance[s] to a better quality or state." *See* Webster's II New College Dictionary 557 (1999) (defining "improve"). In apparent recognition of this concept, the legislature incorporated performance levels and standards into the SDFQPA and, although repealing the 10 goals which served as the foundation for measuring suitability in the *U.S.D. No. 229* decision, has retained a provision which requires the State Board of Education to design and adopt a school performance accreditation system "based upon improvement in performance that reflects high academic standards and is measurable." K.S.A. 72-6439(a). Moreover, the legislature mandated standards for individual and school performance levels "the achievement of which represents excellence in the academic area at the grade level to which the assessment applies." K.S.A. 72-6439(c).

Through these provisions, the legislature has imposed criteria for determining whether it has made suitable provision for the finance of education: Do the schools meet the accreditation requirements and are students achieving an "improvement in performance that reflects high academic standards and is measurable"? K.S.A. 72-6439(a).

These student performance accreditation measures were utilized in 2001 when the legislature directed that a professional evaluation be performed to determine the costs of a suitable education for Kansas school children. In authorizing the study, the legislature defined "suitable

education." K.S.A.2003 Supp. 46-1225(e). The Legislative Education Planning Committee (LEPC), to whom the task of overseeing the study was delegated, determined which performance measures would be utilized in determining if Kansas' school children were receiving a suitable education. The evaluation, performed by Augenblick & Myers, utilized the criteria established by the LEPC, and, in part, examined whether the current financing formula and funding levels were adequate for schools to meet accreditation standards and performance criteria. The study concluded that both the formula and funding levels were inadequate to provide what the legislature had defined as a suitable education.

Although in *Montoy I,* 275 Kan. at 153-55, 62 P.3d 228, we concluded that accreditation standards may not always adequately define a suitable education, our examination of the extensive record in this case leads us to conclude that we need look no further than the legislature's own definition of suitable education to determine that the standard is not being met under the current financing formula. Within that record there is substantial competent evidence, including the Augenblick & Myers study, establishing that a suitable education, as that term is defined by the legislature, is not being provided. In particular, the plaintiff school districts (Salina and Dodge City) established that the SDFQPA fails to provide adequate funding for a suitable education for students of their and other similarly situated districts, *i.e.,* middle- and large-sized districts with a high proportion of minority and/or at-risk and special education students. Additional evidence of the inadequacy of the funding is found in the fact that, while the original intent of the provision for local option budgets within the financing formula was to fund

"extra" expenses, some school districts have been forced to use local option budgets to finance general education.

Furthermore, in determining if the legislature has made suitable provision for the finance of public education, there are other factors to be considered in addition to whether students are provided a suitable education. Specifically, the district court found that the financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise. This failure to do any cost analysis distorted the low enrollment, special education, vocational, bilingual education, and the at-risk student weighting factors.

Thus, there is substantial competent evidence to support the district court's findings discussed above. These findings are sufficient to support the conclusion that the legislature has failed to "make suitable provisions for finance" of the public school system as required by Art. 6, § 6 of the Kansas Constitution.

4. As to the cross-appeal, we affirm the district court's holding that the legislature has not usurped the powers of the State Board of Education.

In addressing the appropriate remedy, as the district court noted, there are "literally hundreds of ways" the financing formula can be altered to comply with Art. 6, § 6. Similarly, there are many ways to re-create or reestablish a suitable financing formula. We do not dictate the precise way in which the legislature must fulfill its constitutional duty. That is for the legislators to decide, consistent with the Kansas Constitution.

It is clear increased funding will be required; however, increased funding may not in and of itself make the financing formula constitutionally suitable. The equity with which the funds are distributed and the actual costs of education, including appropriate levels of administrative costs, are critical factors for the legislature to consider in achieving a suitable formula for financing education. By contrast, the present financing formula increases disparities in funding, not based on a cost analysis, but rather on political and other factors not relevant to education.

We are aware that our decision (1) raises questions about continuing the present financing formula pending corrective action by the legislature; (2) could have the potential to disrupt the public schools; and (3) requires the legislature to act expeditiously to provide constitutionally suitable financing for the public school system. Accordingly, at this time we do not remand this case to the district court or consider a final remedy, but instead we will retain jurisdiction and stay all further proceedings to allow the legislature a reasonable time to correct the constitutional infirmity in the present financing formula. In the meantime, the present financing formula and funding will remain in effect until further order of this court.

We have in this brief opinion endeavored to identify problem areas in the present formula as well as legislative changes in the immediate past that have contributed to the present funding deficiencies. We have done so in order that the legislature take steps it deems necessary to fulfill its constitutional responsibility. Its failure to act in the face of this opinion would require this court to direct action to be taken to carry out that responsibility. We

believe further court action at this time would not be in the best interests of the school children of this state.

The legislature, by its action or lack thereof in the 2005 session, will dictate what form our final remedy, if necessary, will take. To ensure the legislature complies with our holding, we will withhold our formal opinion until corrective legislation has been enacted or April 12, 2005, whichever occurs first, and stay the issuance of our mandate in this case.

Affirmed in part and reversed in part.

SENATE BILL No. 549

An Act concerning school districts; relating to school finance; amending K.S.A. 72-6435 and 72-6441 and K.S.A. 2005 Supp. 72-978, 72-6405, 72-6407, 72-6409, 72-6410, 72-6412, 72-6413, 72-6414, 72-6414a, 72-6414b, 72-6415b, 72-6426, 72-6433, 72-6434, 72-6439, 72-6442b, 72-64c04, 72-8204c, 72-8814, 72-9509 and 75-2319 and repealing the existing sections: also repealing K.S.A. 2005 Supp. 75-2320.

* * *

Sec. 19. K.S.A. 2005 Supp. 72-6433 is hereby amended to read as follows: 72-6433. (a)(1) The board of any district may adopt a local option budget in each school year in an amount not to exceed an amount equal to the district prescribed percentage of the amount of state financial aid determined for the district in the school year. As used in this section, "district prescribed percentage" means:

* * *

(B) "State prescribed percentage" means ~~27% for school year 2005-2006, 29%~~ *30%* for school year 2006-2007 and ~~30%~~ *31%* for school year 2007-2008 and each school year thereafter.

* * *

(e) To the extent the provisions of the foregoing section conflict with this subsection, this subsection shall control. ~~Any district that adopted or was authorized to adopt a local option budget for school year 2004-2005 in an amount equal to 25% may adopt a local option budget for school year 2005-2006 in an amount not to exceed the state prescribed percentage in effect on July 1, 2005, by adoption of a resolution. Such resolution shall not be~~

~~subject to the provisions of this section relating to publication, protest or election.~~ *Any resolution authorizing the adoption of a local option budget in excess of 30% of the state financial aid of the district in the current school year shall not become effective unless such resolution has been submitted to and approved by a majority of the qualified electors of the school district voting at an election called and held thereon. Such resolution shall specify how the moneys will be expended and shall be published in the manner provided by this section. The election shall be called and held in the manner provided by this section.*

* * *

228 E 48 NYC 10017 May 12 2005

Letter to the Editor
Lawrence Journal World

In regard to your May 5 2005 piece "Vonnegut: Lawyers could use a literary lesson," which had to do with my story "Harrison Bergeron" and its involvement in recent litigation anent Ryan Montoy et al. vs State of Kansas:

You got it wrong. The attorneys got it right.

Your reporter Scott Rothschild gave me no clear idea of what the case was about, which I now know to be actions by the legislature as preposterous to me as any lampoon I ever wrote. My story mocks the idea of legally eliminating envy by outlawing excellence, which is precisely what the legislature means to do—in the public schools, by putting a cap on local spending on them. Should it prevail, it will be possible for me to say there are no longer any truly excellent public schools in all of Kansas. Talk about a level playing field!

May I say to those who know my story, which ends in the execution of an enviably gifted student by a Handicapper General: We have always had Handicapper Generals among us, empowered by envy, Mark Chapman, who shot John Lennon, and Lee Harvey Oswald, who shot John F. Kennedy, to name but two.

/s/ Kurt Vonnegut
Kurt Vonnegut

"Harrison Bergeron" by Kurt Vonnegut

Harrison Bergeron

by Kurt Vonnegut (1961)

I'd like you to read this famous story and think about whether Nietzsche wasn't on to something when he criticized the naive idea of human equality.

THE YEAR WAS 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else. All this equality was due to the 211th, 212th, and 213th Amendments to the Constitution, and to the unceasing vigilance of agents of the United States Handicapper General.

Some things about living still weren't quite right, though. April, for instance, still drove people crazy by not being springtime. And it was in that clammy month that the H-G men took George and Hazel Bergeron's fourteen-year-old son, Harrison, away.

It was tragic, all right, but George and Hazel couldn't think about it very hard. Hazel had a perfectly average intelligence, which meant she couldn't think about anything except in short bursts. And George, while his intelligence was way above normal, had a little mental handicap radio in his ear. He was required by law to wear it at all times. It was tuned to a government transmitter. Every twenty seconds or so, the transmitter would send out some sharp noise to keep people like George from taking unfair advantage of their brains.

George and Hazel were watching television. There were tears on Hazel's cheeks, but she'd forgotten for the moment what they were about.

On the television screen were ballerinas.

A buzzer sounded in George's head. His thoughts fled in panic, like bandits from a burglar alarm.

"That was a real pretty dance, that dance they just did," said Hazel.

"Huh?" said George.

"That dance – it was nice," said Hazel.

"Yup," said George. He tried to think a little about the ballerinas. They weren't really very good – no better than anybody else would have been, anyway. They were burdened with sashweights and bags of birdshot, and their faces were masked, so that no one, seeing a free and graceful gesture or a pretty face, would feel like something the cat drug in. George was toying with the vague notion that maybe dancers shouldn't be handicapped. But he didn't get very far with it before another noise in his ear radio scattered his thoughts.

George winced. So did two out of the eight ballerinas.

Hazel saw him wince. Having no mental handicap herself she had to ask George what the latest sound had been.

"Sounded like somebody hitting a milk bottle with a ball peen hammer," said George.

"I'd think it would be real interesting, hearing all the different sounds," said Hazel, a little envious. "All the things they think up."

"Um," said George.

"Only, if I was Handicapper General, you know what I would do?" said Hazel. Hazel, as a matter of fact, bore a strong resemblance to the Handicapper General, a woman named Diana Moon Glampers. "If I was Diana Moon Glampers," said Hazel, "I'd have chimes on Sunday – just chimes. Kind of in honor of religion."

"I could think, if it was just chimes," said George.

"Well – maybe make 'em real loud," said Hazel. "I think I'd make a good Handicapper General."

"Good as anybody else," said George.

"Who knows better'n I do what normal is?" said Hazel.

"Right," said George. He began to think glimmeringly about his abnormal son who was now in jail, about Harrison, but a twenty-one-gun salute in his head stopped that.

"Boy!" said Hazel, "that was a doozy, wasn't it?"

It was such a doozy that George was white and trembling and tears stood on the rims of his red eyes. Two of the eight ballerinas had collapsed to the studio floor, were holding their temples.

"All of a sudden you look so tired," said Hazel. "Why don't you stretch out on the sofa, so's you can rest your handicap bag on the pillows, honeybunch." She was referring to the forty-seven pounds of birdshot in canvas bag, which was padlocked around George's neck. "Go on

and rest the bag for a little while," she said. "I don't care if you're not equal to me for a while."

George weighed the bag with his hands. "I don't mind it," he said. "I don't notice it any more. It's just a part of me.

"You been so tired lately – kind of wore out," said Hazel. "If there was just some way we could make a little hole in the bottom of the bag, and just take out a few of them lead balls. Just a few."

"Two years in prison and two thousand dollars fine for every ball I took out," said George. "I don't call that a bargain."

"If you could just take a few out when you came home from work," said Hazel. "I mean – you don't compete with anybody around here. You just set around."

"If I tried to get away with it," said George, "then other people'd get away with it and pretty soon we'd be right back to the dark ages again, with everybody competing against everybody else. You wouldn't like that, would you?"

"I'd hate it," said Hazel.

"There you are," said George. "The minute people start cheating on laws, what do you think happens to society?"

If Hazel hadn't been able to come up with an answer to this question, George couldn't have supplied one. A siren was going off in his head.

"Reckon it'd fall all apart," said Hazel.

"What would?" said George blankly.

"Society," said Hazel uncertainly. "Wasn't that what you just said?"

"Who knows?" said George.

The television program was suddenly interrupted for a news bulletin. It wasn't clear at first as to what the bulletin was about, since the announcer, like all announcers, had a serious speech impediment. For about half a minute, and in a state of high excitement, the announcer tried to say, "Ladies and gentlemen – "

He finally gave up, handed the bulletin to a ballerina to read.

"That's all right –" Hazel said of the announcer, "he tried. That's the big thing. He tried to do the best he could with what God gave him. He should get a nice raise for trying so hard."

"Ladies and gentlemen" said the ballerina, reading the bulletin. She must have been extraordinarily beautiful, because the mask she wore was hideous. And it was easy to see that she was the strongest and most graceful of all the dancers, for her handicap bags were as big as those worn by two-hundred-pound men.

And she had to apologize at once for her voice, which was a very unfair voice for a woman to use. Her voice was a warm, luminous, timeless melody. "Excuse me – " she said, and she began again, making her voice absolutely uncompetitive.

"Harrison Bergeron, age fourteen," she said in a grackle squawk, "has just escaped from jail, where he was

held on suspicion of plotting to overthrow the government. He is a genius and an athlete, is under-handicapped, and should be regarded as extremely dangerous."

A police photograph of Harrison Bergeron was flashed on the screen – upside down, then sideways, upside down again, then right side up. The picture showed the full length of Harrison against a background calibrated in feet and inches. He was exactly seven feet tall.

The rest of Harrison's appearance was Halloween and hardware. Nobody had ever worn heavier handicaps. He had outgrown hindrances faster than the H-G men could think them up. Instead of a little ear radio for a mental handicap, he wore a tremendous pair of earphones, and spectacles with thick wavy lenses. The spectacles were intended to make him not only half blind, but to give him whanging headaches besides.

Scrap metal was hung all over him. Ordinarily, there was a certain symmetry, a military neatness to the handicaps issued to strong people, but Harrison looked like a walking junkyard. In the race of life, Harrison carried three hundred pounds.

And to offset his good looks, the H-G men required that he wear at all times a red rubber ball for a nose, keep his eyebrows shaved off, and cover his even white teeth with black caps at snaggle-tooth random.

"If you see this boy," said the ballerina, "do not – I repeat, do not – try to reason with him."

There was the shriek of a door being torn from its hinges.

Screams and barking cries of consternation came from the television set. The photograph of Harrison Bergeron on the screen jumped again and again, as though dancing to the tune of an earthquake.

George Bergeron correctly identified the earthquake, and well he might have – for many was the time his own home had danced to the same crashing tune. "My God –" said George, "that must be Harrison!"

The realization was blasted from his mind instantly by the sound of an automobile collision in his head.

When George could open his eyes again, the photograph of Harrison was gone. A living, breathing Harrison filled the screen.

Clanking, clownish, and huge, Harrison stood in the center of the studio. The knob of the uprooted studio door was still in his hand. Ballerinas, technicians, musicians, and announcers cowered on their knees before him, expecting to die.

"I am the Emperor!" cried Harrison. "Do you hear? I am the Emperor! Everybody must do what I say at once!" He stamped his foot and the studio shook.

"Even as I stand here –" he bellowed, "crippled, hobbled, sickened – I am a greater ruler than any man who ever lived! Now watch me become what I *can* become!"

Harrison tore the straps of his handicap harness like wet tissue paper, tore straps guaranteed to support five thousand pounds.

Harrison's scrap-iron handicaps crashed to the floor.

Harrison thrust his thumbs under the bar of the padlock that secured his head harness. The bar snapped like celery. Harrison smashed his headphones and spectacles against the wall.

He flung away his rubber-ball nose, revealed a man that would have awed Thor, the god of thunder.

"I shall now select my Empress!" he said, looking down on the cowering people. "Let the first woman who dares rise to her feet claim her mate and her throne!"

A moment passed, and then a ballerina arose, swaying like a willow.

Harrison plucked the mental handicap from her ear, snapped off her physical handicaps with marvelous delicacy. Last of all, he removed her mask.

She was blindingly beautiful.

"Now" said Harrison, taking her hand, "shall we show the people the meaning of the word dance? Music!" he commanded.

The musicians scrambled back into their chairs, and Harrison stripped them of their handicaps, too. "Play your best," he told them, "and I'll make you barons and dukes and earls."

The music began. It was normal at first – cheap, silly, false. But Harrison snatched two musicians from their chairs, waved them like batons as he sang the music as he wanted it played. He slammed them back into their chairs. The music began again and was much improved.

Harrison and his Empress merely listened to the music for a while – listened gravely, as though synchronizing their heartbeats with it.

They shifted their weights to their toes.

Harrison placed his big hands on the girl's tiny waist, letting her sense the weightlessness that would soon be hers. And then, in an explosion of joy and grace, into the air they sprang!

Not only were the laws of the land abandoned, but the law of gravity and the laws of motion as well.

They reeled, whirled, swiveled, flounced, capered, gamboled, and spun.

They leaped like deer on the moon.

The studio ceiling was thirty feet high, but each leap brought the dancers nearer to it. It became their obvious intention to kiss the ceiling.

They kissed it.

And then, neutralizing gravity with love and pure will, they remained suspended in air inches below the ceiling, and they kissed each other for a long, long time.

It was then that Diana Moon Glampers, the Handicapper General, came into the studio with a double-barreled ten-gauge shotgun. She fired twice, and the Emperor and the Empress were dead before they hit the floor.

Diana Moon Glampers loaded the gun again. She aimed it at the musicians and told them they had ten seconds to get their handicaps back on.

It was then that the Bergerons' television tube burned out.

Hazel turned to comment about the blackout to George.

But George had gone out into the kitchen for a can of beer.

George came back in with the beer, paused while a handicap signal shook him up. And then he sat down again. "You been crying?" he said to Hazel.

"Yup," she said,

"What about?" he said.

"I forget," she said. "Something real sad on television." "What was it?" he said.

"It's all kind of mixed up in my mind," said Hazel. "Forget sad things," said George.

"I always do," said Hazel.

"That's my girl," said George. He winced. There was the sound of a riveting gun in his head.

"Gee – I could tell that one was a doozy," said Hazel.

"You can say that again," said George.

"Gee –" said Hazel, "I could tell that one was a doozy."

2

No. 06-472

In The

Supreme Court of the United States

ALEXANDER BERGMAN, *et al.*,

Petitioners,

v.

STATE OF KANSAS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Kansas Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Do Petitioners, who were not parties to the litigation below, have standing to assert federal constitutional claims that were neither raised, litigated, nor decided by the Kansas Supreme Court?

II. PARTIES TO THE PROCEEDING

Petitioners are Kansas school children attending public school in Unified School District No. 512 (Shawnee Mission) and Unified School District No. 229 (Blue Valley), and their parents: Alexander, Katherine, William, James, Brad, and Libby Bergman; Patrick, Doug, Bob, and Debbie Dellinger; Madison, Breanna, and Carol Rowe; Connor, Cameron, and Ann Carollo; Syndey, Wyatt, and Kim Edmisten; Sarah, Nathan, and Dan Goldman; Abigail, Parker, and Bonnie Heying; Connor, Kylie, Courtney, and Tracy Rellihan; Ben and Mary McBride; Graham and Noah Eidemiller; Janice Langholz; Peter, Robby, Joseph, and Judy Moriarty; A.J., Will, Maureen, and Trish Orth; Joe, Sydney, and Mary Bahr; Maxwell, Emma, and Christine Braasch; Chase and Susan Schaible Ainsworth; William, Harrison, and Brian Short; Helen, Anna, and Mary Petrow; Johnnie, Danielle, Alexandria, and Julie Norton; Morris, Charles, Ronald, and Barbara Bronstein; Lauren, Erik, Janis, and Christian Hansen; Ryan, Michael, Daniel, Greg, and Laurie Widrig; Lucy, Mary, and Dan Bush; Jonathon, Jefferson, Caroline, Brad, and Rebecca Adams; Andrew, Alexandra, Katie, Steve, and Lori Dykeman; Taylor, Zachary, Donna, and Jim Wilson; Jason, Michael, Michelle, and James Hoffman; Kristin, Eric, Mary, and Dave Larson; Grace, John, and Aymi Foley; Max, Reilly, Brad, and Michelle Agadoni; John Tyler; Megan, Caroline, Susan, and Mark Koenig; Addison, Jillian, and Michelle Schlatter; Hannah, Max, Janice, and Jeff Pinson; Emma, Cameron, David, and Susan Keefer; John, Paige, Kathryn, and Jim Dussold; Brenan Patrick; Conner James, Dillon Thomas, Linda, and Timothy Cavanaugh; Tyler, Andre, Ahmet, and Lori Kodanaz;

II. PARTIES TO THE PROCEEDING – Continued

Justin, Alexandra, Reid, Rhonda, and Patrick Johnston; Mark, John, Steven, Jennifer, Steve, and Jody Bolton; Blake, Erin, Benjamin, Phil, and Mary Hylton; Bradley, Leslie, Doug, and Shea Dixon; Spencer, Kendra, Betsy, and Tommy Avenia; Trent, Gardner, and Sheryl Wright; Morgan, Elizabeth, Lynne, and Gerald Matile; Marissa, Hayley, Stacey, and Howard Wizig; and John, Joseph, William, and Anne Blessing.

Respondents are as follows:

Plaintiffs Below: Unified School District No. 443 (Dodge City), Unified School District No. 305 (Salina), and students attending school in these two districts, by and through their parents and/or next friends. Those students are Ryan Montoy; Lajuan and Mytesha Robinson; Sierra and Seth Gwin; Rene Bess; Keely Boyce; Cruz Cedillo; Lynette Do; Christopher and Monique Harding; Joseph Hawkinson; Jennie Nguyen; Sandy, Nicole, and Bruce Thu Pham; Andrea Bethke; Damian and Dylan Arredondo; Eduardo Dominguez; Chris Freeman; Monica Garcia; William Zachary Harrison; Robert Hindman; Alex Jake; Yadira Moreno; Manuel Solorzano; Benjamin Vicente; Brittany Ash-Clark; Jin Jeon; Jacob Stack; Bronson Waite; Jacob Lemaster; Nicholas Woodfield Brooke; Blaine Smith; Jerry Dix; Tanner Robidou; and Justin Hostetter.

II. PARTIES TO THE PROCEEDING – Continued

Defendants Below: The State of Kansas;[1] Connie Morris (in her official capacity as a member of the Kansas State Board of Education); Janet Waugh (in her official capacity as a member of the Kansas State Board of Education); Sue Gamble (in her official capacity as a member of the Kansas State Board of Education); John W. Bacon (in his official capacity as a member of the Kansas State Board of Education); Bill Wagnon (in his official capacity as a member of the Kansas State Board of Education); Kathy Martin (in her official capacity as a member of the Kansas State Board of Education); Ken Willard (in his official capacity as a member of the Kansas State Board of Education); Carol Rupe (in her official capacity as a member of the Kansas State Board of Education); Iris Van Meter (in her official capacity as a member of the Kansas State Board of Education); Steve E. Abrams (in his official capacity as a member of the Kansas State Board of Education); and Bob L. Corkins (in his official capacity as Commissioner of Education for the State of Kansas).

[1] Petitioner improperly identifies "the Attorney General of the State of Kansas" and "the Kansas State Board of Education" as Respondents. Neither was a party to the litigation below.

III. CORPORATE DISCLOSURE STATEMENT

None of the Respondents (Plaintiffs Below) are a corporation that has issued shares to the public, nor are any a parent corporation, a subsidiary or affiliate of corporations that have done so.

IV. TABLE OF CONTENTS

		Page
I.	Question Presented	i
II.	Parties to the Proceeding	ii
III.	Corporate Disclosure Statement	v
IV.	Table of Contents	vi
V.	Table of Authorities	vii
VI.	Opinions and Orders Below	1
VII.	Jurisdiction	1
VIII.	Constitutional and Statutory Provisions	2
IX.	Statement of the Case	3
X.	Reasons for Denying the Petition for Writ of Certiorari	11
	A. Petitioners Were Not Parties to the Litigation Below	11
	B. Petitioners Present No Proper Federal Questions For This Court to Review	13
XI.	Conclusion	14

V. TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) (*per curiam*) 14

Crowell v. Randell, 10 Pet. 368, 9 L.Ed. 458 (1836)..... 14

Devlin v. Scardaletti, 536 U.S. 1 (2002) 11, 12, 13

Howell v. Mississippi, 543 U.S. 440 (2005)..... 14

Illinois v. Gates, 462 U.S. 213 (1983)..... 14

Marino v. Ortiz, 484 U.S. 301 (1988) (*per curiam*)..... 12

Montoy v. State of Kansas, 62 P.3d 228 (Kan. 2003) 1, 6

Montoy v. State of Kansas, Case No. 99 c 1738, 2003 WL 22902963 (Shawnee Cnty. Dist. Ct., Dec. 2, 2003)..... 1, 4

Montoy v. State of Kansas, 102 P.3d 1158 (Kan. 2005)..... 1, 5

Montoy v. State of Kansas, 102 P.3d 1160 (Kan. 2005), opinion supplemented, 120 P.3d 306 (Kan. 2005) (Beier, J., Davis, J., Luckert, J., concurring).....1, 5, 7, 12

Montoy v. State of Kansas, 112 P.3d 923 (Kan. 2005).....1, 7, 8, 9 12

Montoy v. State of Kansas, 138 P.3d 755 (Kan. 2006).....1, 9, 10

Owings v. Norwood's Lessee, 5 Cranch 344, 3 L.Ed. 120 (1809)..... 14

Robinson v. State of Kansas, 295 F.3d 1183 (10th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003) 3, 4

TABLE OF AUTHORITIES – Continued

Page

Robinson v. State of Kansas, Case No. 99-1193-MLB, Docket Entry #231 (D. Kan., June 21, 2006) 10

Robinson v. State of Kansas, Case No. 99-1193-MLB, Docket Entry #245 (D. Kan., June 21, 2006) 11

CONSTITUTIONAL PROVISIONS

KAN. CONST., art. VI, § 6 ..... 2, 3, 4

STATE AND FEDERAL REGULATIONS

28 U.S.C. § 1257(a) ..... *passim*

KAN. STAT. ANN. § 60-2102(b) 5

2005 House Bill 2247 ..... 7, 8, 9

2006 Senate Bill 549 ..... 9, 10

VI. OPINIONS AND ORDERS BELOW

The Kansas Supreme Court's opinion reversing the Shawnee County District Court's *sua sponte* dismissal of Plaintiffs' claims is reported at *Montoy v. State of Kansas*, 62 P.3d 228 (Kan. 2003) ("***Montoy I***"). The Memorandum Opinion and Preliminary Interim Order of the Shawnee County (Kansas) District Court is not reported in any official reporter. See, *Montoy v. State of Kansas*, Case No. 99 c 1738, 2003 WL 22902963 (Shawnee Cnty. Dist. Ct., Dec. 2, 2003). The Kansas Supreme Court's opinion affirming in part and reversing in part the decision of the Shawnee County District Court is reported at *Montoy v. State of Kansas*, 102 P.3d 1160, opinion supplemented, 120 P.3d 306 (Kan. 2005) ("***Montoy II***"). On that same day, January 3, 2005, the Kansas Supreme Court denied a motion to intervene by an organization called Kansans for Separation of School and State. That decision is reported at *Montoy v. State of Kansas*, 102 P.3d 1158 (Kan. 2005) ("***Montoy II½***"). The Kansas Supreme Court's June 3, 2005 opinion is reported at *Montoy v. State of Kansas*, 112 P.3d 923 (Kan. 2005) ("***Montoy III***"). The Kansas Supreme Court's July 8, 2005 opinion and order dated July 8, 2005 is not reported in any official reporter. ("***Montoy IV***"). The Kansas Supreme Court's order denying Petitioners' Motion to Intervene is not reported in any official reporter. The Kansas Supreme Court's order dismissing the litigation below is reported at *Montoy v. State of Kansas*, 138 P.3d 755 (Kan. 2006) ("***Montoy V***").

VII. JURISDICTION

Petitioners assert jurisdiction pursuant to 28 U.S.C. § 1257(a). Respondents dispute this assertion and contend there is no jurisdiction over Petitioners' claims because (1)

Petitioners were not parties to the litigation below and (2) there were no federal statutory or constitutional claims raised or decided in the litigation below.

VIII. CONSTITUTIONAL AND STATUTORY PROVISIONS

1. 28 U.S.C. § 1257(a) provides, "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

2. KAN. CONST., art. VI, § 6 provides, in relevant part, "The legislature shall make suitable provision for the finance of the public educational interests of the state. . . ."

IX. STATEMENT OF THE CASE

Respondents, the plaintiffs below,[2] first brought suit against the State of Kansas in the United States District Court for the District of Kansas alleging that the State's scheme for funding public education discriminated against the plaintiffs on the basis of race, ethnicity, national origin, and disability. *See, e.g., Robinson v. State of Kansas*, 295 F.3d 1183 (10th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003). Respondents specifically alleged Equal Protection violations under both the United States and Kansas Constitution, Due Process violations under both the United States and Kansas Constitution, violations of Title VI of the Civil Rights Act of 1964, as amended, violations of the Rehabilitation Act of 1973, and violations of Article VI, Section 6 of the Kansas Constitution. *Id.*

The State of Kansas moved to dismiss, asserting its Eleventh Amendment immunity, among other arguments. *Id.* Before the district court ruled on the State of Kansas' motion to dismiss, Respondents voluntarily moved to dismiss their causes of action arising under state law and filed a separate lawsuit in the Shawnee County (Kansas) District Court. In that state court litigation, Respondents asserted those state law claims that they moved to voluntarily have dismissed in the federal court litigation.

---

[2] There are multiple Respondents to the Petition for Writ of Certiorari. Respondents filing this Brief in Opposition were the Plaintiffs below. The remaining Respondents were, except as noted above, *supra* n.1, defendants below. "Respondents" as used in this Brief in Opposition shall refer to Plaintiffs below. Where reference is made to other Respondents, they will be identified by name or by their party status in the litigation below.

Both the federal court litigation and the state court litigation proceeded simultaneously. In the federal court litigation, the State of Kansas appealed the district court's refusal to dismiss Respondents' causes of action. *See, Robinson v. State of Kansas*, 295 F.3d 1183 (10th Cir. 2002). The Tenth Circuit affirmed the district court's decision and remanded the matter back to the district court. *Id.* The district court, however, elected to hold the litigation in abeyance pending the disposition of Respondents' claims in state court.

Respondents tried their state court claims to the bench in September and October 2003. *Montoy v. State of Kansas*, Case No. 99 c 1738, 2003 WL 22902963 (Shawnee Cnty. Dist. Ct., Dec. 2, 2003). On December 2, 2003, the Shawnee County District Court issued its Memorandum Opinion and Preliminary Interim Order declaring that the State of Kansas' system of funding public education was unconstitutional in violation of the Equal Protection clauses of the United States and Kansas Constitution and Article VI, Section 6 of the Kansas Constitution.[3] *Id.*

Following the issuance of the state district court's opinion, a group called Kansans for Separation of School and State filed a motion to intervene with the state district court. The trial court denied the motion. Kansans for Separation of School and State appealed the state district court's denial of its motion to intervene. The Kansas Supreme Court affirmed the state district court's decision, holding that the state district court did not abuse its discretion in denying the motion to intervene because

[3] The Respondents did not bring any claims in state court alleging violations of the United States Constitution.

the movant's interests were adequately represented by the State of Kansas. *Montoy v. State of Kansas*, 102 P.3d 1158, 1160 (Kan. 2005) (***"Montoy II½"***).

The State of Kansas and the individual defendants named in their official capacity also appealed the state district court's decision directly to the Kansas Supreme Court.[4] On January 3, 2005, in a *per curiam* opinion, the Kansas Supreme Court reversed the Shawnee County District Court's holding that the State's public education funding scheme was unconstitutional in violation of the Equal Protection Clause. *Montoy v. State of Kansas*, 102 P.3d 1160, opinion supplemented, 120 P.3d 306 (Kan. 2005) (***"Montoy II"***). The Kansas Supreme Court affirmed the lower court's holding that the school funding scheme violated Article VI, Section 6 of the Kansas Constitution. *Montoy II*, 102 P.3d at 1163-65. Specifically, the court held:

> [S]tudent performance accreditation measures were utilized in 2001 when the legislature directed that a professional evaluation be performed to determine the costs of a suitable education for Kansas school children. In authorizing the study, the legislature defined "suitable education." [Citation omitted]. The Legislative Education Planning Committee (LEPC), to whom the task of overseeing the study was delegated, determined which performance measures would be utilized in determining if Kansas' school children were

[4] Following the decision of the state district court, the Kansas Legislature amended the Rules of Appellate Procedure to permit direct appeals to the Kansas Supreme Court when a statute is declared unconstitutional in violation of Article VI of the Kansas Constitution. See KAN. STAT. ANN. § 60-2102(b).

receiving a suitable education. The evaluation, performed by Augenblick & Myers, utilized the criteria established by the LEPC, and, in part, examined whether the current financing formula and funding levels were adequate for schools to meet accreditation standards and performance criteria. The study concluded that both the formula and funding levels were inadequate to provide what the legislature had defined as a suitable education.

Although in *Montoy I*, . . . we concluded that accreditation standards may not always adequately define a suitable education, our examination of the extensive record in this case leads us to conclude that we need look no further than the legislature's own definition of suitable education to determine that the standard is not being met under the current financing formula. Within that record there is substantial competent evidence, including the Augenblick & Myers study, establishing that a suitable education, as that term is defined by the legislature, is not being provided. In particular, the plaintiff school districts (Salina and Dodge City) established that the [funding formula] fails to provide adequate funding for a suitable education for students of their and other similarly situated districts, i.e., middle- and large-sized districts with a high proportion of minority and/or at-risk and special education students. Additional evidence of the inadequacy of the funding is found in the fact that, while the original intent of the provision for local option budgets within the financing formula was to fund "extra" expenses, some school districts have been forced to use local option budgets to finance general education.

> Furthermore, in determining if the legislature has made suitable provision for the finance of public education, there are other factors to be considered in addition to whether students are provided a suitable education. Specifically, the district court found that the financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise. This failure to do any cost analysis distorted the low enrollment, special education, vocational, bilingual education, and the at-risk student weighting factors [in the formula].
>
> Thus, there is substantial competent evidence to support the district court's findings discussed above. These findings are sufficient to support the conclusion that the legislature has failed to "make suitable provisions for finance" of the public school system as required by Art. 6, § 6 of the Kansas Constitution.

Montoy II, 102 P.3d at 1164-65.

The Kansas Supreme Court withheld issuing a final order, retained jurisdiction, and provided the State of Kansas the 2005 Legislative Session to remedy the constitutional defects in its system of funding public education. *Id.* at 1165. During the 2005 Legislative Session, the Kansas Legislature passed 2005 House Bill 2247 ("H.B. 2247"). *See, e.g.*, *Montoy v. State of Kansas*, 112 P.3d 923, 926 (Kan. 2005) ("***Montoy III***"). Governor Kathleen Sebelius allowed H.B. 2247 to become law without signing it. *Id.* On April 15, 2005, the Kansas Supreme Court issued a Show Cause Order, directing the parties to submit briefs to the court addressing whether

H.B. 2247 remedied the constitutional defects in the State's school funding scheme. *Id.*

On June 3, 2005, the Kansas Supreme Court issued its opinion in *Montoy III*. In that opinion, the court held that H.B. 2247 did not render the State's system of funding public education constitutional. The court concluded as follows:

> As of this time, the legislature has failed to provide suitable funding for a constitutionally adequate education. School districts have been forced to use the [Local Option Budget] to supplement the State's funding as they struggle to suitably finance a constitutionally adequate education, a burden which the constitution places on the State, not on local districts. The result is wealth-based disparity because the districts with lower property valuations and median incomes are unable to generate sufficient revenue. Because property values vary widely, a district's ability to raise money by the required mill levy also varies widely. The cost-of-living weighting and extraordinary declining enrollment provision[, which were new provisions added to the funding formula in H.B. 2247,] also have the potential to exacerbate inequity. A higher LOB cap, cost-of-living weighting, and the extraordinary declining enrollment provisions cannot be allowed to exacerbate inequities while we wait for the legislature to perform its constitutional duty.
>
> We conclude that, on the record before us, a continuing lack of constitutionally adequate funding together with the inequity-producing local property tax measures mean the school financing formula, as altered by H.B. 2247, still

> falls short of the standard set by Article 6, § 6 of the Kansas Constitution.

Montoy III, 112 P.3d at 937.

The court ordered the State of Kansas to provide additional funding for public education, and to equitably distribute the additional funding, by no later than July 1, 2005. *Id.* at 940. The court's specific order was as follows:

> Specifically, no later than July 1, 2005, for the 2005-06 school year, the legislature shall implement a minimum increase of $285 million above the funding level for the 2004-05 school year, which includes the $142 million presently contemplated in H.B. 2247. In deference to the cost study analysis mandated by the legislature in H.B. 2247, the implementation beyond the 2005-06 school year will be contingent upon the results of the study directed by H.B. 2247 and this opinion.

Id. The governor called the Kansas Legislature back for a special legislative session, during which legislation passed consistent with the Supreme Court's opinion. *Montoy v. State of Kansas*, 138 P.2d 755, 759-60 (Kan. 2006) ("***Montoy V***").

During the 2006 Legislative Session, the Kansas Legislature, having received and reviewed a new education cost study prepared by the State of Kansas Division of Legislative Post Audit, passed new school finance legislation – 2006 Senate Bill 549 ("S.B. 549"). Over the next three years, pursuant to S.B. 549, the State of Kansas will inject hundreds of millions of new dollars into public education. And much of that new money is specifically targeted to impact students with the greatest

educational need – minority students, special education students, students for whom English is not a native language, students from low socio-economic backgrounds. *See, e.g., Montoy V*, 138 P.3d at 760.

The parties below submitted briefs to the Kansas Supreme Court addressing the issue of whether S.B. 549 remedied the constitutional defects previously identified. On June 13, 2006, roughly one week prior to oral arguments in the Kansas Supreme Court, Petitioners filed a motion to intervene. The court denied Petitioners' motion on June 15, 2006. (*See* Petition for Writ of Certiorari, App. 1).

Petitioners submitted a nearly identical motion to intervene in the federal litigation. *Robinson v. State of Kansas*, Case No. 99-1193-MLB, Docket Entry #231 (D. Kan., June 21, 2006). The district court has not ruled on Petitioners' motion.

On July 28, 2006, the Kansas Supreme Court dismissed the litigation, holding that S.B. 549 so materially altered the school finance formula that served as a basis for Respondent's lawsuit that the matter could no longer be decided on the record on appeal available to the court. *Montoy V*, 138 P.3d at 765 ("[T]he school finance formula that was at issue in this case no longer exists. It has been replaced with a fundamentally different funding scheme for which there are no facts and figures in the record from which we could determine how it will operate over the next 3 years.") As a result of Respondents' efforts in state court, the State of Kansas has increased education funding by roughly $755 million per year, with a majority of that new funding being targeted to students who, like

the Respondents, are minority, of non-U.S. national origin, disabled, and/or from a low income household. *Id.*

The federal litigation remains active pending disposition of Respondents' motion to dismiss. *Robinson*, Docket Entry #245 (D. Kan., October 6, 2006).

X. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. Petitioners Were Not Parties to the Litigation Below

Petitioners allege that they are entitled to party status in the litigation below because they are bound by the Kansas Supreme Court's decisions. (See, Petition for Writ of Certiorari, at 3, n.1). Specifically, Petitioners allege:

> [I]f petitioners are bound by the Kansas Supreme [C]ourt decisions, then they should be treated as a "party," not as strangers to the action, because they, in effect, are non-named class members whose interests were not adequately represented by the existing parties to the litigation and who timely objected to the arguments advanced by plaintiffs on their behalf at the earliest opportunity after they became aware of them. *Devlin v. Scardetti (sic)*, 536 U.S. 1 (2002) (holding that non-named class members were entitled to appeal without first intervening when petitioners' interests were not adequately represented by existing parties).

(Petition for Writ of Certiorari, at 3, n.1). Petitioners have misrepresented the nature of the litigation below and misinterpreted this Court's precedent.

"[O]nly parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (*per curiam*). Petitioners were not parties to the lawsuit below and, therefore, lack standing to appeal the Kansas Supreme Court's decisions.

Unlike in *Devlin*, the litigation below was not a class action. *Compare Montoy II*, 102 P.3d at 1160 (noting that plaintiffs were only two school districts and 36 individual students); *Devlin v. Scardaletti*, 536 U.S. 1, 3 (2002) (noting that the litigation below was a class action, certified pursuant to Fed. R. Civ. P. 23). Although, the actions of the Kansas Legislature taken as direct result of Respondents' state court litigation ultimately benefited all Kansas school children, Respondents never took on the burden of representing all Kansas school children. In fact, Respondents advanced many positions that were adverse to the interests of many school districts in the state. *See, e.g., Montoy III*, 112 P.3d 923, 934 (noting Respondents argued that increases in Local Option Budget authority increased inequities in the school funding formula; noting Respondents argued that the Low Enrollment Weighting, which provides additional funding to smaller school districts, exacerbated inequities in the school funding formula). Unlike the plaintiffs in *Devlin*, Respondents in the litigation below were not class representatives and were not advancing claims on behalf of all students in the state. The fact that the Kansas Legislature, prompted by Respondents' state court litigation, passed legislation benefiting all Kansas school children does not render Respondents' the class representatives for all Kansas school children and does not render the litigation below an uncertified class action.

In *Devlin*, this Court held that "[w]hat is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement." *Devlin*, 536 U.S. at 10. This Court further opined that "this feature ***of class litigation*** . . . requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing." *Id.* The litigation below was, unlike the litigation in *Devlin*, not a class action. Petitioners in the present case, unlike the Petitioners in *Devlin*, were not, therefore, unnamed class members. And unlike the litigation in *Devlin*, the litigation below did not involve objections made at a settlement fairness hearing. Petitioners' reliance on *Devlin* is misplaced. Petitioners were not parties to the litigation below and, therefore, have no standing to appeal from the Kansas Supreme Court's decision below.

B. Petitioners Present No Proper Federal Questions For This Court to Review

28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

In *Howell v. Mississippi*, 543 U.S. 440, 443 (2005), this Court, addressing the meaning of 28 U.S.C. § 1257(a) held:

> Congress has given this Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had ... where any ... right ... is specially set up or claimed under the Constitution or the treaties or statutes of ... the United States." [Citation and emphasis omitted]. Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim "was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) (*per curiam*); see also *Illinois v. Gates*, 462 U.S. 213, 218, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (tracing this principle back to *Crowell v. Randell*, 10 Pet. 368, 392, 9 L.Ed. 458 (1836), and *Owings v. Norwood's Lessee*, 5 Cranch 344, 3 L.Ed. 120 (1809)).

In the litigation below, Respondents raised no federal claims, the Kansas Supreme Court addressed no federal claims, and no federal claims were decided by the Kansas Supreme Court. Thus, even if Petitioners could be considered "parties" to the litigation below, which they cannot, their Petition for Writ of Certiorari should still be denied because Petitioners present no proper federal questions for this Court to review.

XI. CONCLUSION

Respondents respectfully request that the Petition for Writ of Certiorari be DENIED because Petitioners were

not parties to the litigation below and because the Kansas Supreme Court addressed no federal claims in the litigation below.

Respectfully submitted,

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Supreme Court, U.S.
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No. 06-472

In The

Supreme Court of the United States

ALEXANDER, KATHERINE, WILLIAM, and JAMES BERGMAN, by and through their parents and next friend, BRAD and LIBBY BERGMAN, et al.,

Petitioners,

v.

STATE OF KANSAS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Kansas Supreme Court

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1988) 4

Cooper v. Aaron, 358 U.S. 1 (1958) 7

Devlin v. Scardelletti, 536 U.S. 1 (2002) 4

Gerstein v. Pugh, 420 U.S. 103 (1975) 10

Gratz v. Bollinger, 539 U.S. 244 (2003) 4

Honda v. Oberg, 512 U.S. 415 (1994) 7, 9

Howell v. Mississippi, 543 U.S. 440 (2005) 5

Marbury v. Madison, 5 U.S. (1 Cranch) 137(1803) 7, 8

Marino v. Ortiz, 484 U.S. 301 (1988) 3, 4

Missouri v. Jenkins (Jenkins I), 495 U.S. 33 (1990) 5

Missouri v. Jenkins (Jenkins II), 515 U.S. 70 (1995) 8

Papasan v. Allain, 478 U.S. 265 (1986) 7

Pruneyard Shopping Center v. Robins, 474 U.S. 74 (1980) 6

San Antonio Sch. District v. Rodriguez, 411 U.S. 1 (1973) 7

Spallone v. U.S., 493 U.S. 265 (1990) 5

United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988) 4

U.S. v. Williams, 504 U.S. 36 (1992) 10

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, §1 7

U.S. Const. art. IV, § 4 7

U.S. Const. art. VI 7

Kan. Const. art. 6, § 6 7

STATUTES

Fed. R. Civ. P. 24(a) 2

Kan.Stat.Ann. 60-224(a) 2

Kan.Stat.Ann. 2003 Supp. 46-1225(e) 9

Kan.Stat.Ann. 72-6439(b) 10

REPLY BRIEF

The Kansas school finance formula does the following:

(1) compels preferential funding for Respondents' schools because of their higher percentages of minority and ethnic students;

(2) mandates decreased funding for Petitioners' schools notwithstanding their worse learning conditions for scholastic improvement on standardized tests than the schools favored by the state;

(3) makes voluntary increased spending on local public education contingent upon an undefined *base* level of education;

(4) imposes judicially unmanageable standards of scholastic "need" as a new common law rule for allocating state revenue; and

(5) prohibits Petitioners from reducing the state-imposed funding deficits with their own money and local funds.

The State of Kansas, therefore, discriminates against Petitioners based upon race and other suspect classifications and deprives them of fundamental liberties protected by the Federal Constitution. For the reasons stated below, Petitioners present substantial federal questions and are "parties" for the purpose of appealing the lower court decisions which adversely adjudicated their federal rights and claims without notice or an opportunity to be heard:

Petitioners are "Parties" for the Purpose of this Appeal.

Petitioners' schools are in the bottom tier of all school districts in terms of per pupil operating expenditures–they are some of the poorest in the State. (*See*, Kansas State Board of Education's 2005-2006 Per Pupil Expenditures by District Statistics.)

Petitioners reside in Johnson County, Kansas which contributes the vast majority of tax revenue to the state for public education – 25.7% of the total – more than any other county by a significant margin. (*See*, County Comparison of Various State Tax Collections from the Kansas Department of Revenue's Annual Report for 2005.) Yet, Johnson County schools receive less than eight percent (8%) of the State's funding for public education. (*See*, Kansas State Board of Education's 2005-2006 Per Pupil Expenditures by District Statistics.) That is almost a three (3) to one (1) ratio of money contributed versus funding received.

The Kansas Rules of Civil Procedure governing intervention as of right are modeled after the Federal Rules of Civil Procedure. *Compare* K.S.A. 60-224(a) to Fed. R. Civ. P. 24(a). Petitioners satisfied each and every factor for intervention *of right*. Yet, the Kansas Supreme Court arbitrarily denied intervention. Respondents objected to Petitioners' intervention claiming that Respondents alone spoke for all Kansas school children and, therefore, adequately represented Petitioners' interests in the subject matter of the litigation.[1]

---

[1] *See* Respondents' June 15, 2006 Response to Motion to Intervene filed in the Kansas Supreme Court and their Response to Motion to

(Continued on following page)

Yet, Respondents state the exact opposite to this Court. Respondents now admit they never adequately represented the interests of Petitioners and were adverse to Petitioners' interests all along.[2] This judicial admission alone demonstrates the impropriety of the Kansas Supreme Court's denial of Petitioners' intervention.[3]

While Respondents rely on *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), that case is distinguishable. The petitioners in that case chose not to seek intervention; whereas, these instant Petitioners here did move to

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Intervene filed in the United States District Court for the District of Kansas as Dkt. No. 239, p. 2 ("The Applicants do not have a right to intervene . . . because their interests are adequately represented by existing parties. . . . Applicants argue their interests diverge from plaintiffs' since they challenge different components of the school funding scheme . . . however . . . their objective remains to find [the statute] unconstitutional . . . therefore, the presumption arises that the plaintiffs adequately represent Applicants' [petitioners'] interests. . . . Applicants and plaintiffs may attack different components of the scheme under different theories, but they both share the ultimate goal of equitable and adequate school funding for all Kansas students.").

[2] Opposition Brief at 11 ("Respondents never took on the burden of representing all Kansas school children. In fact, Respondents advanced many positions that were adverse to the interests of many school districts in the state."). Respondents inconsistently also now seek attorneys' fees under 42 U.S.C. § 1988 in federal court for allegedly prevailing on, in effect, federal questions before the Kansas Supreme Court in *Montoy*. They cannot have it both ways.

[3] The Motion to Intervene filed by Kansans for Separation of School and State was denied by the Kansas Supreme Court because that group's opposition to any tax increase for additional school funding was adequately represented by the State defendants who similarly opposed any tax increase. Also, a year prior to Petitioners' Motion to Intervene, the Shawnee Mission Unified School District No. 512 moved to intervene, but on 7/7/05, the court also summarily denied intervention without opinion. **Moreover, Petitioners' Motion to Intervene was filed within the expedited time frame for briefing ordered by the court.**

intervene. *Id.* at 303. The Kansas Supreme Court, however, *forbid* Petitioners from intervening. In *Marino*, this Court specifically stated that when nonparties learn their interests in the litigation are not adequately represented, "the better practice is for such nonparties to seek intervention for purposes of appeal; denials of such motions are, of course, appealable." *Id.* at 304. Petitioners did exactly as this Court instructed. Accordingly, the denial of their motion to intervene is directly appealable to this Court and is subject to *de novo* review on the merits.

Moreover, in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), this Court stated, "we have never restricted the right to appeal to named parties to the litigation." *Id.* at 7-8. Just as witnesses who were held in contempt were entitled to appeal even though they were not parties; so, here too, **Petitioners may appeal not only the Order denying intervention, but the other adverse decisions similarly binding and directly harming them**. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988). Like a contempt order, the Kansas Supreme Court's remedial orders actually penalize Petitioners for living in a property-rich area and attending public schools with lower percentages of minority and ethnic children. *See*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1988).

This is an even better case than *Devlin* for permitting an appeal because in *Devlin* the dissenting Justices were reluctant to permit an appeal when the Petitioners had not properly moved to intervene *and* had resisted the invitation to intervene. *Id.* at 20-21, n.4. In contrast, instant Petitioners did try to intervene.

Moreover, for all intents and purposes, this litigation functioned as a class action. The Kansas Supreme Court itself acknowledged that its decision, "would have statewide effect." (App. 83-84.) This was public interest litigation, not a private dispute. Plaintiffs purposefully excluded Petitioners to pursue a redistributive theory of justice detrimental to Petitioners' interests. Accordingly, Petitioners were denied due process because they were denied access to the courts to petition their grievance while their interests in the subject matter of the litigation were adjudicated to their detriment. *Missouri v. Jenkins* (*Jenkins I*), 495 U.S. 33, 66 (1990) ("[T]he exercise of judicial power involves adjudication of controversies and imposition of burdens on those who are parties before the court. The order at issue is not of this character. It binds the broad class of all KCMSD taxpayers. It has the purpose and direct effect of extracting money from persons who had had no presence or representation in the suit. For this reason, the District Court's order imposing a tax was more than an abuse of discretion, for any attempt to collect the taxes from the citizens would have been a blatant denial of due process."); *Spallone v. U.S.*, 493 U.S. 265 (1990) (Court imposed sanctions against nonparty councilmen for constitutional violation was excessive remedy which deprived nonparties of procedural due process. The remedial orders here are far more manipulating and corrupting to the legislative and judicial process than those struck in *Spallone* because here the Petitioners are *innocents*.)

Federal Questions Are Properly Presented.

Howell v. Mississippi, 543 U.S. 440 (2005) also is inapposite. Unlike *Howell*, where the federal claim neither was "addressed by" the state court nor "properly presented

to the state court that rendered the decision," here Petitioners did raise specific federal claims, cited relevant federal constitutional provisions, and discussed specific federal case law in their Motion to Intervene. (*See* App. 105-126, excerpts from Motion to Intervene attached hereto.) The fact that the Kansas Supreme Court denied the Motion to Intervene without opinion does not change the fact that the federal questions were raised.

Most importantly, in *Pruneyard Shopping Center v. Robins*, 474 U.S. 74, 79-80, 86, n.9 (1980), this Court expressly stated, "federal claims [are] adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or revises its prior interpretation." *Id.* at 87, n.9 (citations omitted). That is exactly what happened in this case. Pet. for Cert., pp. 7, 10. Therefore, the federal questions upon which Petitioners seek review were adequately pressed below.[4]

The Kansas Supreme Court also actually decided federal questions when it rejected the federal equal protection claim decided *sua sponte* by the trial court. App. 84. Petitioners contend this judgment is erroneous and misapplies this Court's precedent. At bottom, this is a constitutional "floor" and "ceiling" case which requires strict

[4] In any event, Respondent, the State of Kansas, raised related federal questions in its Motion to Lift the Stay wherein the State argued the Kansas Supreme Court's remedial order violated the Fourteenth Amendment as well as Article IV, § 4 of the Federal Constitution and cited federal case law in support of its motion. On 9/21/05, the court summarily denied the motion. *Pruneyard Shopping Center v. Robins*, 474 U.S. 74, 79-80 (1980).

scrutiny, not a rational relations test. *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50, n.107, 67 (1973).[5]

In *Papasan v. Allain*, 478 U.S. 265 (1986), this Court distinguished disparities in funding for public education which arise as a result of varying wealths of geographic areas and *disparities which arise as a result of intentional decisions by the State to allocate unequal funding* to different school districts. Under the Federal Constitution, the former is constitutional; the latter more often is not.

The Kansas Supreme Court, however, came to the opposite conclusion holding that local property taxes were "inequitable" and as such, impermissible even though they were constitutional. App. 7, 63, 69. They cannot be "equal" and yet "inequitable" at the same time – a contradictory and nonsensical result. **Can a state court use its equity power to trump the Federal Constitution?** The Supremacy Clause should prohibit the state court engrafting onto the state constitution a meaning of "suitable" inconsistent with the meaning of "equal protection of the laws" in the Fourteenth Amendment. *Honda v. Oberg*, 512 U.S. 415 (1994); *Cooper v. Aaron*, 358 U.S. 1 (1958) (the constitutional rights of children not to be discriminated against in public schools on grounds of race or color can neither be nullified openly and directly by state legislators, state executives, or judicial officers nor nullified indirectly by them through evasive schemes).

The Kansas Supreme Court specifically discussed and cited as authority this Court's seminal case, *Marbury v.*

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[5] To be clear, Petitioners do not contend education is a fundamental right; rather, other fundamental rights are being deprived. *See* App. 105-126.

Madison, 5 U.S. (1 Cranch) 137 (1803). However, the Kansas Supreme Court reads too much into *Marbury*. While it may be true that "the judiciary's sworn duty includes judicial review of legislation for constitutional infirmity" (App. 51), it does not follow that a state court's remedial power is unlimited as the Kansas Supreme Court's decisions suggest:

> Moreover, unlike federal courts, state courts need not be constrained by federalism issues of comity or state sovereignty when exercising remedial power over a state legislature, for state courts operate within the system of a single sovereign. . . . Nor should doubts about the court's **equitable power** to spur legislative action or to reject deficient legislation impede judicious oversight. (App. 54) (emphasis added.)

The logical conclusion of the court's foregoing argument is that a state court's "equitable" remedial power is unlimited – having determined a constitutional violation exists, the state court's "equitable power" to remedy the violation has no bounds. On the contrary, that would necessarily mean a state court's remedial discretion can function as an end-run around the Federal Constitution. *Missouri v. Jenkins* (*Jenkins I*), 495 U.S. 33, 55 (1990) ("We have emphasized that although the remedial powers of an equity court must be adequate to the task . . . they are not unlimited. . . ."); *Missouri v. Jenkins* (*Jenkins II*), 515 U.S. 70 (1995) (This Court questioned the legitimacy of a district court's attempt to remedy "white flight" which was not itself an unconstitutional condition. Thus, is the "achievement gap" a similarly multifaceted, sociological and demographic phenomenon, not an unconstitutional condition?).

The court never specifies the degree of tailoring between legislative ends and means required to fulfill the court's new common law "equity" or "actual cost" rules for school finance. Although the court states it uses the legislature's "own definition of suitable education," this definition is inappropriate for construing the meaning of "suitable provision for the finance of the educational interests of the state" in the state constitution. K.S.A. 2003 Supp. 46-1225(e). It cannot be considered the definition of a "minimally adequate" education when it includes items and activities not even subject to the state's standardized assessments. Standardized testing is the very basis for the "achievement gap", and the "achievement gap" is the alleged constitutional wrong for which the court crafted its discriminatory and confiscatory "equitable" remedy. Indeed, during oral argument, some justices rightly observed that the Augenblick & Myers cost study did not compile actual costs of a *basic* education, but, instead, compiled *assumed* costs of an *ideal* education.

The court also employed another judicially unmanageable standard: "[the] focus must be on *needs* and the appropriate costs thereof." App. at 75 (emphasis added.) Does the court thereby incorporate a Marxist-Leninist political philosophy into constitutional adjudication: "From each according to ability to each according to need?" This new common law rule is frightening given the Federal Constitution's protection of political freedom. "Need" simply is too vague and indefinite to be judicially manageable and, as such, invites inaccurate and arbitrary adjudication. *Honda*, 512 U.S. at 430-431.

Neither the Kansas Supreme Court nor the legislature has yet defined *the appropriate conditions of learning* for a

foundational level of education.[6] Without this definition, the "actual costs" of that mythical level of education are meaningless. The court has set in motion, therefore, a system of ad hoc rulemaking by which any judicial decree from this point forward will be *ex post facto* in nature and, as such, arbitrary. The Kansas school finance formula and the decisions below, therefore, violate petitioners' First and Fourteenth Amendment rights. These are federal questions which were properly "pressed" to the court below but nonetheless were ignored. As such, federal jurisdiction in this court is proper. *U.S. v. Williams*, 504 U.S. 36 (1992); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (where state's adjudicative procedures violated Federal Constitution, this Court's jurisdiction to review those procedures is proper).

CONCLUSION

For the reasons stated in the Petition and herein, the Petition for Certiorari should be granted. In the alternative, this Court should vacate the January 3, 2005, June 3, 2005, and July 28, 2006 decisions, reverse denial of the Motion to Intervene, grant Petitioners' intervention, and remand the case for further proceedings consistent with this Court's opinion.

[6] Petitioners contend that on the record before the Kansas Supreme Court, a proper definition of a minimally adequate education to which all children in Kansas would be entitled, i.e. the constitutional "floor", was available for the court's consideration, but the court refused to entertain it, e.g., comparable teachers teaching the core curriculum (as defined by K.S.A.72-6439(b)) in comparable small class sizes. The core curriculum is subject to standardized testing. ("The State Board of Education shall provide for assessments in the core academic areas of mathematics, science, reading, writing, and social studies.")

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B. Applicants Seek to Make Specific Constitutional Claims which Demonstrate That They Have A Substantial Interest in the Subject Matter of this Pending Action.

1. Equal Protection Analysis.

In 1973, the United States Supreme Court decided *San Antonio Sch. Dist. v. Rodriguez,* 411 U.S. 1 (1973), which held that public education was not a fundamental right under the federal constitution and that wealth was not a suspect classification. As a consequence, the Court rejected an equal protection and due process challenge to Texas' statutory school finance scheme for public education which, like Kansas, funded K-12 public education with state and local taxes. However, the Court did recognize that one constitutional challenge to a state's system of funding public education could be successfully asserted, but the plaintiffs in that case had not done so. In his dissenting opinion, Justice White articulated what would constitute a proper constitutional challenge under the federal constitution. Specifically, Justice White stated that he believed a state's ceiling on local taxation presented a federal constitutional question for under funded schools. As he observed,

> But state [Texas] law places a . . . **ceiling** on the . . . tax rate, a limit that would surely be reached long before Edgewood (the plaintiff school district) attained an equal yield [to other school districts]. Edgewood is thus **precluded in law, as well as in fact, from achieving a yield even close to that of some other districts.**

Rodriquez, 1 U.S. at 67. Like Edgewood, the Shawnee Mission and Blue Valley school districts are under funded by the state in terms of per pupil operating expenditures.

Like Texas' ceiling on local taxation criticized by Justice White, so Kansas' ceiling on the local option budget similarly prevents the Shawnee Mission and Blue Valley School districts "in law, as well as in fact, from achieving a yield even close to some other school districts." *Id.* Even with the money generated from the local option budget combined with the money from the state, the total combined money for Shawnee Mission and Blue Valley schools still is below the average total funding for all school districts in Kansas for classroom instruction.

In response to Justice White's observation, the majority acknowledged that state caps on local taxation would indeed present a constitutional question:

> Mr. Justice White suggests in his dissent that the Texas system violates the Equal Protection Clause. . . . He places special emphasis on the statutory provision that establishes **a maximum (local tax) rate** . . . at which a local school district may tax for school maintenance. . . . [However] Appellees do not claim that the **ceiling** presently bars *desired tax increases* in Edgewood or in any other Texas district. Therefore, the constitutionality of that statutory provision is not [yet] before us, and **must await litigation in a case in which it is properly presented.** 1 U.S. at 50, fn. 107, *citing, Hargrave v. Kirk,* 313 F. Supp. 944 (M.D. Fla. 1970), *vacated,* 401 U.S. 476 (1971) (emphasis added).

While the Texas Edgewood plaintiffs did not claim that the ceiling on local taxation prevented "desired tax increases" to improve local public education, Applicants do make this very constitutional challenge to the Kansas lid on local taxation.

As the Court in *Robinson v. Cahill,* 303 A.2d. 273, (N.J. 1973) stated, "The [Rodriquez] majority of course did not say there could never be a successful equal protection attack. . . . Indeed, in footnote 107, the majority speaking of Mr. Justice White's dissent, recognized that if a statute imposed a ceiling which barred desired tax increases in a district, there would be an arguable issue, the majority referring to *Hargrave v. Kirk, . . .*" *Id.* at 488.

In *Hargrave v. Kirk,* 313 F. Supp. 944 (1970), a federal three-man court held that a Florida statute which imposed a ceiling on local taxation for public schools did indeed violate the 14th Amendment's guarantee of equal protection of the laws. In so holding, the Court stated:

> The State may not grant a benefit subject to a condition which violates the Equal Protection Clause. *See Sherbert v. Verner,* 1963, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965; *Keyvishian v. Board of Regents of New York,* 1967, 385 U.S. 589, 605-06, 87 S. Ct. 675, 17 L. Ed. 2d 629. . . . what interest has the State of Florida in preventing its poorer counties from providing as good an education for their children as its richer counties? As postulated by the plaintiffs, 'The legislature says to a county, 'you may not raise your own taxes to improve your own school system, even though that is what the voters of your county want to do:
>
> We have searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act. While the state undoubtedly has a valid interest in preserving the fiscal integrity of its programs, and may legitimately attempt to limit its expenditures for public education, or any other purpose, it may not

accomplish such a purpose by invidious discrimination between classes of its citizens.' *Citing, Shapiro v. Thompson,* 1969, 394 U.S. 618, 633, 89 S. Ct. 1322, 1330, 22 L. Ed. 2d 600. . . . The Florida Act prevents the local Boards from adequately financing their children's education. The complaint is not that the state permits the Boards to spend less, but that it *requires* them to spend less. Plaintiffs are asking to be able to raise more money locally. . . . we know that there will continue to be disparities in per pupil expenditures in Florida, either because some counties may not desire to spend as much as other counties on the education of their children, or because, in the poorer counties, they cannot. Plaintiffs do not contest the variations in per pupil expenditures from these causes, but only 'the unequal impediment placed on us by the state. . . . Unlike the broad relief sought [in other cases], the remedy here is simple – an injunction against state officials from taking any action because of a county's refusal to limit its taxes to ten mills [the state ceiling] imposed by the Act. . . . The granting of this relief will give the disadvantaged counties authority to raise their taxes above the ten mill limit [the State cap].

. . . . Thus, our judgment holding the Act unconstitutional will not interfere at all with the state's fiscal affairs and operations, nor will it interfere with the orderly and effective operation of the schools or the assessment and collection of taxes. . . . For the reasons we have outlined, we hold that the Millage Rollback Act [Florida's ceiling on local taxation] – which required as a condition of participation in the State's Minimum Foundation Program that a county board of public instruction; shall levy no more than ten mills

> of tax' . . . are unconstitutional. The plaintiffs' Motion for Summary Judgment is granted and the defendants are enjoined [from imposing the cap on local taxation or penalizing any local board for raising local funds beyond the state's ceiling]. *Id.* at 947-950 (emphasis added).

Although the United States Supreme Court vacated that three-man court's judgment on procedural grounds, in *Rodriguez,* the Court acknowledged the merits of the *Hargrave* court's analysis on the equal protection claim with respect to the ceiling on local taxation for public education. 411 U.S. 50 at fn. 107. In *Kirk v. Hargrave,* 401 U.S. 476 (1971) the Court held that the lower federal court should have waited until the companion state case had run its course and resolved the issue of adequate funding on state law grounds. As the *Robinson* v *Cahill* court observed,

> *Askew v. Hargrave,* 401 U.S. 476, 91 S. Ct. 856,28 L. Ed. 2d 196 (1971), recognizes a potential for an equal protection complaint in this area. There the Florida Statute provided that no state aid for education could be had if the ad valorem tax levied in a county for education exceeded a stated millage rate. A three-man court found the **restriction . . . irrational, noting that it 'prevents the local boards from adequately financing their children's education.'** *Hargrave v. Kirk,* 313 F. Supp. 944, 949 (M.D. Fla. 1970). . . . The Supreme Court vacated the judgment saying the federal court should abstain until a pending attack in the state courts on state grounds is resolved. . . . *Robinson,* 303 A.2d 273, fn. 2 (1973).

In contrast, however, the constitutionality of the Kansas school finance formula and, in particular, the cap on the local option budget is ripe for review in this Court.

2. First Amendment Analysis.

The Kansas legislature's purpose in setting a ceiling on local taxes for improving public education is allegedly to equalize funding among school districts throughout the state for public education. The public policy rationale is that wealthier school districts should not be able to access more funds for their children's education than poorer school districts.[1] However, in *Buckley v. Valeo,* 424 U.S. 1 (1976), the United States Supreme Court rejected government imposed spending caps for similar egalitarian purposes as unconstitutional deprivations of liberty under the First amendment of the federal constitution. In that case, Congress had imposed similar spending caps on the amount of money that could be spent on political campaigns to similarly try to equalize the relative financial ability of candidates running for public office. Congress did not believe it was fair for wealthier candidates to be able to spend more money for political campaigns than could relatively poorer candidates. Congress believed that

[1] It is important to note that according to the official statistics of which this Court may take judicial notice, the Kansas cap on the local option budget prevents school districts with low, not high, per pupil revenue from achieving equality, not superiority, with other school districts in the State. Therefore, the alleged purpose of the ceiling is not even applicable to the facts of this case. In any event, even if the per pupil expenditures for Blue Valley and Shawnee Mission were the same *as,* or even higher than, other school districts, the ceiling still would be unconstitutional for the reasons articulated in *Buckley as* discussed above.

wealthier candidates have an unfair advantage over relatively poorer candidates and wanted to prevent such unfair advantages. Thus, Congress imposed a ceiling on expenditures for political campaigns to equalize campaign finance among candidates. The United States Supreme Court rejected the expenditure caps as unconstitutional under the First Amendment.

The Court detailed the fundamental First Amendment freedoms at stake with respect to the campaign expenditure caps:

> Discussion of public issues . . . [and] debate are integral to the operation of the system of government established by our Constitution. . . . The First Amendment affords . . . protection . . . to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . . This no more than reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . . **In a republic where the people are sovereign:, the ability of the citizenry to make informed choices . . . is essential. . . .** (424 U.S. at 14-15; 96 S. Ct. at 632,633, *citing Roth v. U.S.*, 354 U.S. 476, 484 (1957); *Winters v. New York*, 333 U.S. 507, 510 (1948); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (emphasis added).

The Court also noted that the idea of collective action to enhance public debate was preservative of the fundamental individual liberties protected by the First Amendment. In so holding, the Court stated,

> The First Amendment protects political association as well as political expression. The constitutional right of association explained in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that '**effective advocacy** of both public and private points of view, . . . is undeniably **enhanced by group association**. . . . 424 U.S. at 14-15; 96 S. Ct. at 632-633, *citing Kusper v. Pontikes*, 414 U.S. 51, 56, 57 (1973); *quoted in*, *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975) (emphasis added).

It is with these "fundamental rights" and "principles" in mind that the Court evaluated the governmental "limitations upon the giving and spending of money in political campaigns." *Id.* Opponents of the campaign finance caps contended the ceilings on contributions and expenditures were at the core of political speech and that the Act's limitations were thus restraints on First Amendment liberty that were both gross and direct; whereas, proponents of the spending caps argued the caps merely regulated conduct, not speech, and, in any event, any effect on speech and association was incidental to First Amendment freedoms. 424 U.S. at 16-17; 96 S. Ct. at 633-34. The Court rejected the categorization of the spending caps as merely regulating conduct, not speech. In so holding, the Court stated:

> The interests served by the Act include restricting the voices of people and interest groups who have the money to spend and reducing the overall scope of federal election campaigns. Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression

> by citizens and groups. 424 U.S. at 17; 96 S. Ct. at 634 (emphasis added).

Thus, the Court recognized that a spending cap did not itself prevent citizens or candidates from actually speaking and exercising their right to free speech; however, the spending caps' interference with the people's ability to spend their own money for the purpose of enhancing communication between the electorate and those running for public office did trigger fundamental First Amendment freedoms. The fact that the government was not actually regulating the content of what was said was no matter. The point was an uninhibited, wide-open, robust marketplace of ideas was compromised by such expenditure caps. *See Keyishian v Board of Regents of Univ. of New York*, 385 U.S. 589 (1967) (discussing public education as a locus for the uninhibited, wide open, robust marketplace of ideas deserving First Amendment protection).

The United States Supreme Court condemned the notion that the government could cap campaign expenditures to equalize the relative ability of less wealthy candidates to effectively campaign for public office. The Court held that campaign expenditure limitations which prohibited spending money on political campaigns beyond a certain level violated the First Amendment. In declaring these expenditure ceilings unconstitutional, the Court stated:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy . . . imposed by [the] expenditure ceiling. **But the concept that**

> **government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. which was designed to secure the widest possible dissemination of information** from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. 424 U.S. at 48-49; 96 S. Ct. at 649, *citing NIT v. Sullivan*, 376 U.S. at 266, *quoting Associated Press v. United States*, 326 U.S. 20, and *Roth v. United States*, 354 U.S. at 484 (emphasis added).
>
> **[T]he 1st Amendment [does not] permit Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments in our society . . . *Id.***

In short, "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise. In the free society ordained by our Constitution, it is not the government, but the people, individually as citizens . . . and collectively as associations . . . who must retain control over the quantity and range of debate on public issues. . . . " 424 U.S. at 57-58; 96 S. Ct. at 653.

Just as the core issue for the Court in *Buckley v. Valeo* was who should control the quantity of information in political campaigns, the government or the people; so, the issue of control is at the heart of the constitutionality of the cap on local taxation for public education. Just as the First Amendment prohibited the national government from limiting the overall quantity of debate in *Buckley v.*

Valeo; so, in *Montoy*, the First and Fourteenth Amendments similarly should prohibit state governments from limiting and controlling the quantity of education any community's children can obtain. The people, acting through their local school board, should decide the maximum level of education they can afford, not the state.

Indeed, in *DeRolph v State*, 78 Ohio St. 3d 193, 211, 677 N.E.2d 733 (1997), a school finance case, the Ohio Supreme Court stated that its "decision should not be construed as imposing spending ceilings on more affluent districts. School districts are still free to augment their programs if they choose to do so." The Ohio Supreme Court's statement, of course, begs the question: are school districts, and in particular, the parents and residents residing within those school districts, in fact, "free" under the state and federal constitutions to choose to spend their own money on their own children's public education to enhance the level of education they receive? The Kansas cap on local taxation suggests not. However, importantly, *Rodriquez*, *Hargrave*, and *Buckley*, suggest the United States Supreme Court would strike down State caps as unconstitutional under the First Amendment as well as under an equal protection analysis if given the chance to do so.

3. Substantive Due Process Analysis.

In *Moore v. East Cleveland*, 431 U.S. 494 (1977), the United States Supreme Court invalidated a local ordinance on substantive due process grounds because the state regulation prohibited a grandmother from using her own property to house her grandchildren. In so holding, the Court found the state regulation unduly interfered

with "property" and "liberty" interests protected from such state encroachment under the 14th Amendment. Almost twenty (20) years later, in *Nixon v. Shrink*, 528 U.S. 377 (2000), the United States Supreme Court struck down state-imposed spending caps on political campaigns as unconstitutional under the First Amendment. In a concurring opinion, Justice Stevens wrote that he would invalidate expenditure caps as unconstitutional under a substantive due process analysis. Relying on *Moore v. East Cleveland*, he stated,

> Our constitution and our heritage properly protect the individual's interest in making decisions about **the use of his or her own property**. Governmental regulation of such decisions can sometimes be viewed either as 'deprivations of liberty' or as 'deprivations of property.' *Nixon v. Shrink*, 528 U.S. 377, 398-399, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000) (Justice Stevens concurring), *citing Moore v. East Cleveland*, 431 U.S. 494, 513, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (emphasis added).

For the reasons stated by Justice Stevens in Nixon and the United States Supreme Court in Moore, the Kansas cap on expenditures for public education is unconstitutional under a substantive due process analysis because the cap unduly interferes with the fundamental rights of citizens to spend their own money on something they value, i.e., improvement of their children's local public education. In the words of Justice Stevens, the cap on the local option budget would constitute a "[g]overnmental regulation . . . [which] can . . . be viewed either as 'deprivations of liberty' or as 'deprivations of property.' *Nixon*, 528 U.S. at 398-399, *citing Moore v. City of Cleveland*, 431 U.S. 494, 513 (1977). *See also*,

Meyer v Nebraska, 262 U.S. 390 (1923) (parents have a fundamental substantive due process right to provide foreign language instruction to their children, and the state is prohibited from impinging on that liberty interest); *Pierce v Society of Sisters*, 268 U.S. 610 (1925) (state law compelling enrollment in public schools as opposed to private or parochial schools is unconstitutional as an undue interference with parents' fundamental right to liberty with respect to upbringing of their children); *Zelman v. Doris Simmons-Harris et al.*, 336 U.S. 639 (2002) (state programs providing tuition aid in the form of vouchers for some students to attend public or private school is constitutional because it furthers parents' freedom of choice for the education of their children); *Lujan v Colorado State Bd. Of Educ.*, 649 P.2d 1005, 1023 (Colo. 1982) ("parents have inherent civil right to exercise control over the education of their children"); *Thompson v. Engelking*, 537 P.2d 635, 645 (1975) ("[T]he Little Red School House became an American institution, the center of community life, and a pillar in the American conception of freedom in education and in local control of institutions of local concern").

Accordingly, Applicants seek to assert a substantive due process claim as well with respect to the unconstitutionality of the Kansas' school finance formula, as amended by S.B. 549, which is the "property" or "transaction" which is "the subject of the [pending] action." K.S.A. 60-224(a).

4. Procedural Due Process Analysis.

As argued herein, Applicants have a right to be involved as parties in this action. Any remedy this court

fashions will impact Applicants. Indeed, Applicants respectfully submit that with respect to the Kansas Supreme Court's continuing stay of the local funding provision known as the Cost of Living Weight, this Court exceeded its remedial discretion and adversely impacted Applicants' interests and rights. Any continuation of the state's cap on the local option budget or restriction on local funding for public education by the legislature or this Court would violate Applicants' 14th Amendment due process rights. For these reasons, Applicants want to be involved in this proceeding to defend their interests and make their constitutional claims with respect to SB 549 while this Court is considering the constitutionality of SB 549 and fashioning a remedy.

A. The Common Law "Inherent Equitable" Limits on Judicial Remedial Power Made Applicable to State Courts Through the 14th Amendment's Due Process Guarantee – the Jenkins I and II Tests.

In justifying this Court's June 3, 2005 and July 8, 2005 remedial decrees, the Kansas Supreme Court stated the following:

> Nor should doubts about the court's **equitable power** to spur legislative action or to reject deficient legislation impede judicious oversight. An active judicial role in monitoring remedy formulation is well-rooted in the court's **equitable powers**. As long as such power is exercised only after legislative noncompliance, it is entirely appropriate. *Citing* Note, "Unfulfilled Promise: School Finance Remedies and State Courts," 104 Harv. L. Rev. 1072, 1087-88 (1991) (emphasis added).

The logical conclusion of the Court's foregoing argument is that the Court's "equitable" remedial power is unlimited – having determined a constitutional violation exists, the Court's "equitable power" to remedy the violation has no bounds. On the contrary, to so interpret the federal constitution and the applicable United States Supreme Court precedent would necessarily mean a state court's remedial discretion can function as an end-run around the federal constitution entirely and that a state court could violate the federal constitution at will so long as it did so while exercising its remedial authority.

The Court's arguments regarding the nature and scope of the Court's remedial powers ignore applicable limitations on its remedial power. The federal Constitution imposes an "inherent equitable limitation" on a state court's remedial "equitable power" through the Due Process Clause of the 14th amendment. Since this limit on judicial power is "inherent" in the concept of judicial authority within a democratic form of government, judicial remedial authority necessarily becomes usurpatious, undemocratic and arbitrary when a court's "equitable power" is exercised without due regard for these common law limitations. When this happens, due process guarantees of the 14th amendment are impinged and a federal question is triggered.

In *Missouri v. Jenkins (Jenkins I)*, 495 U.S. 33 (1990) the United States Supreme Court held that the lower federal court abused its discretion in fashioning a remedy to end segregation in the Kansas City Missouri School District ("KCMSD") when that lower court directly imposed a tax increase on Kansas City, Missouri citizens. The trial court in that case had decided that a court-imposed tax increase, while an albeit extraordinary remedy, was

nevertheless a proper exercise of the court's remedial discretion to correct the constitutional violation.

The United States Supreme Court disagreed, finding that the trial court had exceeded its remedial power. The Supreme Court explained that the trial court's direct tax increase on Kansas City citizens violated the equitable doctrine restricting judicial remedial power because the order increasing taxes was more obtrusive to democratic governance than an order enjoining the state's cap on local taxation for public education. In other words, the least restrictive remedy would have required the court to first empower and direct the local school district to tax itself **beyond the level of the state cap on taxation**. "Permitting the school board to set the tax levy itself would minimize disruption of state laws and processes and would ensure maximum consideration of the views of state-local officials." *Id.* at p. 43. In so holding, the Court stated:

> In assuming for itself the fundamental and delicate power of taxation, the District Court not only intruded on local authority but circumvented it altogether. Before taking such a drastic step, the District Court was obliged to assure itself that no permissible alternative would have accomplished the required task." Id. at 51 (emphasis added).

Thus, in addressing the equitable limits on a court's remedial powers, the court said:

> We have emphasized that although the remedial powers of an equity Court must be adequate to the task . . . they are not unlimited . . . [*citing Whicomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858 (1971)], one of the most important limits on a court's exercise of equitable power is a proper

> respect for the integrity and function of local governmental institutions. Especially is this true where, as here, those institutions are ready, willing and able, but for the operation of state law, to remedy the deprivation of constitutional rights themselves. *Id.* at 55 (emphasis added).

So, here too, in *Montoy*, the residents of the school districts who would benefit from the local funding provisions are ready, willing and able to pay a tax increase above and beyond the spending cap on the local option budget to achieve parity with other school districts that have higher per pupil operating expenditures – to similarly improve the quality of education in their school districts.

As the Supreme Court concluded, the less intrusive remedy to democratic governance is enjoining the cap on local taxation. ("Here, the KCMSD may be ordered to levy taxes despite the statutory limitations on its authority in order to compel the discharge of an obligation imposed on the KCMSD by the Fourteenth Amendment. . . . State policy must give way when it operates to hinder vindication of federal constitutional guarantees" 495 U.S. at 55.)

The same equitable limitation on judicial remedial discretion is applicable to this Court in this case. According to the United States Supreme Court, the Fourteenth Amendment compels an equity court, any equity court, state or federal, to first enjoin the state's cap on local taxation before it can order more expansive remedies. In staying the Cost of Living Weight, the Kansas Supreme Court chose an illogical and excessive remedy. By withholding the local funding provisions, it further reduced overall funding for public education which the Court already held was constitutionally inadequate – a seemingly nonsensical result. In doing so, it exceeded its

authority to an even greater extent than did the federal district court in *Jenkins*. Withholding the local provisions only hurts the at risk, bilingual, and special education children in the Non-Party districts – the very category of children the Court says it is trying to help. Staying the local funding provisions does not help the plaintiff school districts, but it does hurt the school districts and school children enrolled in those districts who stand to benefit from those provisions – statutory provisions the Court found to be constitutional.

B. The Common Law "Inherent Equitable" Limits on Judicial Remedial Power Made Applicable to State Courts Through the 14th Amendment's Due Process Guarantee the *Honda* Test.

Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994) provides additional guidance for this Court with respect to dissolving its stay of the Cost of Living Weight. Honda involved the United States Supreme Court's review of a state court's interpretation of a state constitutional amendment on 14th Amendment procedural due process grounds. The Court effectively reviewed the manner in which the Oregon Supreme Court rendered its decision. The Court concluded that as interpreted by the Oregon Supreme Court, the Oregon constitutional amendment regulating imposition of punitive damages in civil personal injury cases violated the 14th Amendment's guarantee of procedural due process because the state constitutional amendment invited arbitrary decision making by juries. The Oregon Supreme Court's interpretation of the state constitution, therefore, deprived the citizens of Oregon of a federal constitutional right, i.e. procedural due process.

The interesting question about Honda for this case, therefore, is how the Supreme Court departed from its traditional deference to state court interpretations of a state's own constitution.

While the Oregon constitutional amendment to the state constitution merely allocated fact – finding power to juries in civil disputes and therefore did not itself violate the federal Constitution on its face, the Supreme Court held that, as applied by the Oregon Supreme Court, the constitutional amendment violated the 14th Amendment of the federal constitution by allowing unrestrained juror discretion, divorced from common law limitations on remedial discretion.

In this case, Applicants submit that the interpretive procedures and reasoning employed by this Court in construing Article 6 of the Kansas Constitution departs from traditional equitable doctrines governing legitimate adjudication, just as Oregon's highest court in *Honda* departed from traditional equitable doctrines limiting remedial discretion. As the United States Supreme Court stated, "What we are concerned with is the possibility that a culpable defendant may be unjustly punished . . . Oregon's abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the due process clause." *Honda*, 512 U.S. at 429-430. The Court stated in no uncertain terms: "When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." (emphasis added). *Honda*, 512 U.S. at 430-431. Similarly, the July 8, 2005 remedial decree in this case fails to comply with the traditional common law equitable doctrine limiting a

court's remedial discretion to the least obtrusive means to democratic governance to remedy the constitutional wrong. This absent procedure would "provide protection against arbitrary and inaccurate adjudication."

The equitable common law doctrine restricting a judicial remedial decree to the least restrictive means to remedy the alleged constitutional wrong would not have permitted the Court to stay all local funding, a means not causally related to the court's alleged end. Local funding is not harmful to the plaintiff school districts and is beneficial to other school districts that need additional funding for public education to achieve per pupil expenditures comparable to those enjoyed by a majority of other school districts in the state. Staying local funding therefore is an excessive and arbitrary remedy.

Applicants disagree, however, with the Legislative Coordinating Council's argument that this Court cannot order the legislature to fund education at any specific level because that is the exclusive province of the legislature and to do so would violate Article IV, Sec. 4' s, Republican Form of Government Guarantee. Rather, Applicants believe a doctrinally correct understanding of the issue involves a more narrow tailoring of this Court's remedial decree to comport with the 14th Amendment Due Process guarantee.

CONCLUSION AND RELIEF REQUESTED

In conclusion, Applicants recognize the difficulty and complexity of the issues in this case. They applaud the plaintiffs/appellees and this Court's courageous and compassionate attempt to forge new legal doctrines to reform the state's system of funding public education.

Applicants also are sensitive to their brethren in other school districts across the state and appreciate that, like Applicants, they too are motivated by the most powerful and enduring force: the love of their children.

That having been said, Applicants are threatened by SB549. The State foists too great a burden on Applicants without an adequate corollary benefit, and in doing so, violates Applicants' fundamental rights. As a consequence, Applicants are entitled to intervene to assert their constitutional claims and protect their rights. Applicants bring to the table a reasoned, proportionate, and fair resolution of the constitutional issues in this appeal.

For the reasons stated herein, Applicants request the following relief:

1. Grant Applicants' Motion For Leave to Intervene for the purpose of making arguments advocating the following remedies:

a. Enjoin the cap on the local option budget;

b. Mandate distribution of funding for the At-Risk Non-Proficient category at the same level as regular "At-Risk" category;

c. Enjoin the one (1) year sunset on At-Risk Non-Proficient category;

d. Enjoin application of the Low Enrollment Weighting for Base State Aid Funding so that the total funding to High Enrollment School Districts increases; and Dissolve the Court's stay of the Cost of Living Weight and Mandate it be immediately funded at the level recommended by the Legislative Post Audit Report; *i.e.*, $41.8 million.

2. Order Responses to Applicants' Constitutional Arguments by June 19, 2006;

3. Permit Applicants to present an oral argument at the June 22, 2006, 9:30 a.m. hearing in this matter;

In the alternative, Applicants request that the Court:

1. Allow the first year of S.B. 549's three (3) year plan to take effect, but retain jurisdiction and order a regular briefing schedule on the constitutionality of the balance of S.B. 549 and the related constitutional claims addressed in this Motion and in other briefing filed with this Court; so that, full and complete relief can be achieved consistent with the federal and state constitutions; and

2. Dissolve the July 8, 2005 Stay of the local funding provision known as the Cost of Living Weight and allow it to take immediate effect.